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CONTENTS

THE INDIAN JOURNAL OF INTERNATIONAL LAW

'ol. 39 July-September 1999 No. 3

CONTENTS

RTICLES



OTES AND COMMENTS



JDICIAL DECISIONS

**International**



FFICIAL DOCUMENTS

## BOOK REVIEWS

THE INDIAN JOURNAL OF INTERNATIONAL LAW

Vol. 39 October-December 1999 No. 4

CONTENTS

# NEW DELHI WORKSHOP ON INTERNATIONAL REFUGEE LAW

## (20-21 February 1998)

## ISIL-UNHCR

## I. INTRODUCTION

On 20-21 February 1998, the Indian Society of International Law, in conjunction with the Office of the United Nations High Commissioner for Refugees in New Delhi, organised a Workshop on International Refugee Law. The keynote speaker at the two-day workshop was Professor James Hathaway of the Osgoode Hall Law School of York University, Toronto. Professor Hathaway is a leading expert on international refugee law and has lectured and published widely on the subject. In the following pages, excerpts of interventions by select participants and Professor Hathaway's lecture at the workshop are reproduced.

Professor Hathaway's description of the current crisis in refugee protection sets the backdrop for his model for reformulating and revitalising the system of international refugee law. The full text of the model for reform was published in *Harvard Human Rights Journal* vol. 10 (1997), with relevant social science background studies found in *Reconceiving International Refugee Law* (Kluwer, Dordrecht, 1997). The lecture reproduced in this issue of *the Indian Journal of International Law* is, as much as possible, a full reproduction of Professor Hathaway's presentation in New Delhi.

## II. STATEMENT OF WELCOME

Chairman of the Workshop, Dr P. Sreenivasa Rao, Joint Secretary, Ministry of External Affairs, Government of India and Chairman of the International Law Commission made the following statement of welcome:-

"May I, on behalf of the Indian Society of International Law and the Office of the United Nations High Commissioner for Refugees in Delhi, and on my own behalf, welcome you to this important workshop on International Refugee Law, a topic of great importance and a topic that is being discussed and will continue to be discussed in various international fora including this one where I see a number of friends from Jawaharlal Nehru University and other important academic

institutions. Not wishing to stand between the distinguished speaker we have today with us, Professor James Hathaway of the Osgoode Hall Law School, Canada, and the other important remarks to be made by Professor R.P. Anand, I call upon Professor Anand to give a few introductory remarks in his capacity as the Executive President of the Indian Society of International Law."

## III. OPENING REMARKS

The opening remarks by Professor R.P. Anand, Executive President, ISIL were as follows:-

"It is a pleasure for me to welcome you all to this Workshop on International Refugee Law to be addressed by an eminent jurist, Professor James Hathaway of the Osgoode Hall Law School of York University, Toronto, who is a great expert on this subject of increasing importance. Let me first of all take this opportunity to warmly thank the Office of the United Nations High Commissioner for Refugees and the Canadian High Commission in New Delhi for sponsoring this workshop.

As all of you know, in our turbulent and troubled world a large number of tormented individuals or groups are forced to leave or flee their countries. They have, as is often the case, to go to countries which do not want to accept them. Even if the host countries take these refugees, they generally cannot afford to keep them or even feed them, resulting in massive humanitarian problems. India itself had to face this problem in a big way at the dawn of its independence in 1947 when more than 10 million refugees came to India after the division of this country and millions left the country to go to the newly established state of Pakistan. Even though I myself did not come to Delhi at that time—to India from Pakistan where I was born—most of my relatives came from that part of the world which later became part of Pakistan. I remember as a child all those tormented individuals who had to suffer untold problems, having lost all that they had and were forced to start afresh from scratch. Thank God they were not treated as outsiders. But the refugees in our days are unwelcome guests and have to face innumerable difficulties. In 1971, India again received more than 10 million refugees from the erstwhile East Pakistan which emerged as the independent state of Bangladesh. The problem was largely solved for India when the refugees went back to their new country. But there are so many people nowadays who have to leave their home countries, have nowhere to go and are not welcome anywhere. What can and should the international community do for such unwanted and unfortunate

people? Professor Hathaway has been involved with these problems for a long time and we are looking forward to receiving some enlightenment from him in the course of this workshop."

## IV. INTRODUCTORY REMARKS

By Ms Irene Khan, Chief of Mission, UNHCR, New Delhi.

"As one of the world's leading authorities on refugee law, it is a great pleasure and privilege for us to have Professor Hathaway here with us. I know we are all looking forward to his presentation which I am sure will give us plenty of food for thought and material for a lively discussion, not only on current problems but also on future strategies.

The visit of Professor Hathaway to India is part of a continuing process which we in UNHCR have been actively sponsoring—to build global links with academics, jurists, policy makers and institutions, and to promote teaching, research and exchange of views on refugee and migration issues. Over the last few years, UNHCR, in co-operation with a number of institutions such as the ICRC, the Indian Society of International Law, the National Law School of India University, a host of NGOs and other research institutes throughout India, and I would even say throughout the region, have developed a wide range of training, research, and promotional activities and we hope that these modest efforts which we have started will receive broader support in the future. The purpose of networking, of sharing ideas, of encouraging debate and dialogue, is really to enhance the knowledge and understanding of refugee issues in South Asia, and to allow a South Asian perspective on these issues to be better appreciated in the international arena.

Canada, from where Professor Hathaway comes, has a strong record in providing protection to diverse refugee populations. India also shares that common humanitarian history together with other countries of South Asia. Tibetans, Chakmas, Sri Lankan Tamils, Afghans, Burmese, Iranians, Sudanese, Somalis and many others have found refuge in India in recent times. This generosity is particularly commendable because the protection afforded to refugees in South Asia is without any formal legal basis since no (South Asian) country has so far acceded to the international refugee conventions or adopted national laws. However, as lawyers, we know that a legal framework is valuable in providing certainty and avoiding inconsistencies. As part of UNHCR's efforts to encourage states to look into this area we are promoting discussions among jurists on what kind of a legal framework would meet the needs of refugees as well as the concerns of states in South Asia. One initiative

that has been taken up by a number of eminent persons in this region, led by Justice P.N. Bhagwati, has been a project to develop a Model National Law on Refugees.

Scholarly research and studies can help support this process of searching for an appropriate legal response, particularly because there is a feeling among many people that existing refugee instruments and mechanisms are not appropriate or adequate for South Asia and that new thinking is necessary. This is where Professor Hathaway's own work in trying to reformulate refugee law becomes very interesting for those of us working in India. We are all very keen to hear Professor Hathaway's analysis of the crisis of international refugee protection as well as proposals to develop a new system of regional burden sharing or to use Professor Hathaway's own words, "a system of collectivised and solution oriented protection".

## V. SESSION 1—"CRISIS IN INTERNATIONAL REFUGEE LAW"

### KEYNOTE ADDRESS

by

Professor James Hathaway

"It is a real pleasure to have this opportunity to address leading members of the Indian Society of International Law. The essential thesis I will develop in these lectures is that we international lawyers need urgently to re-assert the importance of a rights-based regime for the protection of involuntary migrants. International refugee law should be understood as a system of human rights protection, by which the international community agrees to act as surrogate guarantor of the dignity of persons compelled to leave their own country.

In the developed countries of the North, however, refugee law has largely been captured by immigration advocates, who see it as little more than an auxiliary vehicle to assist people who wish to migrate. The stature of refugee law in most of the South is even more precarious. Refugee protection in the less developed world has rarely focussed on compliance with legal norms, but has more frequently been a matter of simply coping with mass influx, of somehow getting through from one day to the next.

In contrast, my view is that it is in the best interests of both states and refugees themselves to re-assert the fundamental importance of international refugee law as traditionally conceived. First, refugee law

is not about facilitating migration. Its goal is to deliver safety for the duration of a serious risk, to ensure a life in dignity for refugees until and unless they can safely return to their homes. Migration, in other words, is a means to an end, not an end in itself.

Second and equally important, refugee law is about accountability. It is about accepting the fact that it is not sufficient simply to do good work. I believe it is important at the level of international morality for all states to be willing to take responsibility for the way they treat those who are most vulnerable, clearly including those who have no choice but to flee their own country. I, therefore, resist the increasing tendency to treat refugee protection as a matter of purely domestic concern, or of international discretion. The structures of international refugee law define the reception and fair treatment of involuntary migrants as a matter of formal obligation, which is as it should be.

I will begin with a candid appraisal of the fundamental purpose of international refugee law. In its origins, refugee law is unquestionably Eurocentric. Refugee law evolved as a reaction to the erection of 'immigration law walls' in Europe, commencing in the latter part of the 19th century. Whereas previously outsiders had enjoyed relative freedom of international movement, the rising influence of 'nation state' ideology induced European governments to pursue the alignment of political and social communities. Foreigners came to be seen not as sources of communal enrichment, but rather as presumptive threats to social solidarity.

The rise of immigration law reflected a determination of governments to control membership in their national communities in a way that they believed would be socially productive. Rather than simply allowing outsiders to pursue their particularized ambitions in whatever country they wished, immigration law imposed a fundamental barrier on individual liberty, purportedly in the collective interest of societies of destination. Beginning in Britain in the late 19th century, and in the rest of Europe and beyond during the early years of the 20th century, states began to build immigration walls to keep most foreigners away.

The Bolshevik Revolution, however, presented a fundamental threat to the exclusionary project. About one-and-a-half million people fled what was to become the Soviet Union, into the states of Europe. When their situation at home became intolerable, these people did what desperate people have always done and will (I believe) always do, namely, find ways to leave, legally or illegally. Thus, notwithstanding the wall of European immigration laws, the Russian refugees simply crossed into neighbouring countries.

This phenomenon of massive illegal entry presented the states of Europe with a conundrum. They had 1.5 million desperate people from Russia, persons who were shortly thereafter denationalized by the new government of the Soviet Union, living in their midst. These persons were frequently not allowed to work, could not send their children to school, and had no ability to function as productive members of the communities to which they had travelled. Their presence was, therefore, socially destabilizing. What to do?

On the one hand, governments had no intention of renouncing their systems of immigration control. On the other hand, more than a million people had just thumbed their noses at those rules. The logical answer was to admit that a watertight migration control regime could not, in practical terms, prevent the entry of truly at-risk people. The best that could be achieved was, therefore, to legitimise that which was, in any event, socially inevitable. Refugee law was devised as a means to formalise an exception to immigration control that would sustain the protectionist norm. By stipulating the circumstances under which a "trump card" on immigration control rules accrues to seriously at-risk persons, refugee law validates the basic commitment to the exclusion of most outsiders. It reconciles a determination to deny entry to most foreigners to the practical inevitability of forced migration.

In a sense, refugee law functions as a sluice gate in the dam of immigration control. It is the means by which some water from the far side of the dam is let through in order to safeguard the viability of the dam itself. It constrains and channels undesired inflows, and thereby maximizes manageability in what might otherwise be a fundamental unmanageable situation. Refugee law also ensures that the pressure on the immigration dam does not build to a level that threatens to crush the structure itself. It was certainly not a perfect answer for states committed to immigration control, but it was perceived to be the least bad practicable option.

In sum, refugee law was established as part of, and inherently connected to, the immigration control project. While there is no question that it has in practice afforded a means for many desperate persons to migrate, refugee law accepts that states ordinarily have the prerogative to constrain the entry of non-nationals. It is, however, an acknowledgement that discretion of this kind is not practically tenable when a state is faced with the force of people determined to flee serious threats in their own state. Refugee law is a compromise. It constrains state authority over immigration, but does so in the best interests of the preservation of that same sovereign authority.

In my view, neither its European roots nor the fact that refugee law is not an unadulterated route to individual freedom of movement should not blind us to its enormous value as a practical tool by which to operationalise human rights protection. It is a reasonable accommodation of the continuing determination of governments—increasingly in the South, not just in the North—to build immigration dams. Refugee law embodies a view of ethicality that tempers idealism with pragmatism. I believe that this is an appropriate stance in international law: a genuinely ethical standard should both constrain state practice, yet be capable of driving state practice. If a given standard does no more than facilitate critical appraisal, it is unlikely to make much practical difference in the lives of real human beings.

This refugee protection system is, however, in crisis today. States of both the North and South are increasingly withdrawing from the notion of assuming legal obligations towards refugees, and arguing in favour of a range of discretionary responses to the problem of involuntary migration. Some erroneously view this shift as heralding the emergence of a more flexible protection regime. In practice, the result has simply been less protection.

The essence of the governmental critique of refugee law in the North is that refugee law cannot be counted on to play its role as a 'sluice gate in the dam of immigration control.' It has instead come to be seen as an unselective, externally imposed system of permanent immigration. This optic has led governments to build more and more immigration dams, farther and farther up the river. The hope is to contain refugees at or near their place of origin, so that a sluice gate is no longer needed.

Why this crisis of confidence in international refugee law?

Notwithstanding the basic theory of refugee law—that a person who satisfies the refugee definition has the right to be received in dignity and with full respect for their basic human rights until and unless it is safe for them to go home—many academics, and even UNHCR, have argued in favour of an equation of refugee status with a right to permanent reception in an asylum country. At best, protection for the duration of risk has been referred to as a 'complementary remedy.' This approach, as a matter of law, is incorrect. Temporary protection is the remedy mandated by the Refugee Convention.

The confusion of refugee protection and immigration arose from historical circumstances in the North during the years following the entry into force of the Refugee Convention in 1951. Because refugees in the post-War era were largely of European stock, there was a willingness to reach out in ways that reflected a commonality of race

and culture. There was an openness to refugees during the 1950s and 1960s because refugees were 'like us'.

As well, there was a desperate need for labour in Western Europe, North America, Oceania, and South Africa, the countries to which refugees travelled. Refugees provided needed manpower with which to rebuild the economies after the Second World War.

Third and not least important, most of the refugees arriving in the developed world were coming from the ideological enemies of the states to which they were travelling. There was a strategic and political value in a refugee: every time we said a person from one of our adversaries had a 'well-founded fear of persecution', we scored ideological points at the expense of our enemies. To say that someone was at risk of persecution in the Soviet Union was implicitly an affirmation of the moral superiority of the capitalist world.

In sum, there was a context-specific openness to refugees because they were ethnically and culturally similar to the states to which they fled; because they were economically valuable at a time when large infusions of labour were required; and because they affirmed the importance of a continuing battle against Communism.

Because of this interest-convergence between refugees and the states which received them, the fairly strict compromise set by international refugee law (admission in exchange of a segregation of refugees protection from immigration) was often dispensed with. Whether by law or simply in practice, governments of the developed world began to assimilate refugees to permanent immigrants. Thus, anyone who qualified under the refugee definition was allowed to join the asylum state's community, even though international law only required protection for the duration of risk. Many countries, including Canada and the United States, formalized this linkage between refugee status and permanent immigration status in their domestic laws. Non-governmental activists and lawyers logically came to see refugee protection and immigration as inherently linked.

During the 1980s, however, the nature of refugee flows to the developed world changed. First, refugees from the South quickly came to outnumber European refugees. Because these refugees were racially and culturally dissimilar from the dominant populations in receiving countries, they were perceived to be socially destablising. Second, the developed world was no longer interested in encouraging large-scale infusions of labour. To the contrary, there was rampant unemployment in most of the North. If there was a critical shortage of a particular kind of labour, the need could better be addressed by a selective immigration

policy than by an openness to refugees. And third, certainly by the beginning of the 1990s, the idea that there was any ideological value in refugees was an anachronism. There was no longer any ideological advantage to the granting of asylum. If anything, refugees were viewed as a potential source of political friction with countries that might offer economic or other value to the developed world.

The problem, however, was that domestic laws or practice in the North had—international refugee law notwithstanding—come to equate refugee status with a right to permanent entry. It was politically difficult for states to retreat from that position. States, therefore, devised a pernicious means to avoid the legal equation of refugee status with permanent admission, which I refer to as the politics of *non-entrée*.

The logic behind *non-entrée* is simple. Developed countries had embraced policies that granted any refugee who reached them not just the (legally mandated) right to dignified protection for the duration of risk, but to permanent admission; yet the reasons that led to the equation of refugee status with permanent residence no longer existed. While laws could be changed, this would expose governments to the (arguably justified) charge of discrimination against non-Europeans. What to do?

The entire 'problem' could most easily be avoided by stopping refugees from getting to developed states in the first place. By working to prevent arrivals, the industrialised countries have achieved 'the best of both worlds'. If few refugees reach their borders, then few are in practice able to claim the benefit of the 'refugee as permanent immigrant' system. The legal and political imperatives to maintain sophisticated status determination systems and to go on extending permanent resident status to recognized refugees can continue because only a minority of would-be asylum seekers are in a position to claim those entitlements. Rather than severing the linkage between refugee protection and immigration, governments opted simply to close their doors to most refugees.

The beauty of *non-entrée* is that it avoids the need to engage in the politically messy enterprise of dismantling prevailing expectations. Because most refugee advocates in the developed world see refugee protection as an avenue to permanent immigration, they would undoubtedly have resisted any attempt to disaggregate the two notions.

The battle was avoided altogether by securing much the same goal through the legally unreveiwable approach of deterrent measures implemented outside the territory under the jurisdiction of the asylum state. There has been a proliferation of visa controls imposed on the nationals of major refugee-producing states, enforced by economic

sanctions against any common carrier that brings undocumented entrants to the North. A visa will not, of course, be issued for the purpose of making a claim to Convention refugee status. The small number of refugees who could once reach the developed world has been drastically reduced.

The determination of developed states to avoid the arrival of refugees into territory where they can claim legal rights has even led states to take actions fundamentally inconsistent with their own political values. France, for example, unsuccessfully tried to declare part of the Paris Airport not to be French territory (in consequence of which refugees could be 'legally' expelled without fear of judicial intervention). Perhaps most notoriously, the government of the United States sent its Coast Guard cutters into international waters to destroy the boats of Haitian asylum seekers, and even to return them directly to their country of origin. More recently, it has signed an agreement with its arch-enemy, Cuba, intended to stop the flight of Cuban refugees to the United States.

Beyond unilateral efforts, there is also a firm commitment to collectivized undertakings designed to minimize obligations to refugees. The so-called 'country of first arrival' principle has been codified in Europe, and advocated in North America. It purports to 'assign' refugees to be the responsibility of a single asylum state, without regard for the quality of protection offered there. Not only is there no requirement of genuine harmonization of protective standards, but regional treaty law authorizes European governments to force refugees away from European Union territory altogether. With the fall of Communism, Western European governments have increasingly agreed to pay cash-starved countries in Central and Eastern Europe to take the 'responsibility' for refugees destined for developed states. The result has frequently been a pattern of indirect return to the country of origin.

In sum, the North has been willing to undermine even the most basic premise of international refugee law—the study of *non-réfoulement*—rather than confront the domestic political consequences of a severing of the linkage between refugee status and a right to permanent immigration.

What has the impact of the system of *non-entrée* been on the South? At least initially, Southern policies of relative openness to refugees continued. However, the deflection of responsibility by the North clearly exacerbated the South's burdens. The 80 percent or so of the world's refugees who historically remained in the South became closer to 90 percent, as routes out of regions of origin were closed. As incredible as it seems, in the early part of this decade a little country like Malawi,

with a gross national produce per capita of about $200 per annum, was home to more refugees than the USA. Of the 26 states hosting at least one refugee per 100 citizens, 21 were among the world's poorest (i.e. they had a per capita income of less than $1,000 per year).

This has led to an understandable and growing sense of injustice in the South. While it is understandable that most refugees will remain in their region of origin (due to lack of resources, or of inclination to leave), the exacerbation of the asylum responsibilities of the South by Northern *non-entrée* practices was appropriately viewed as unacceptable.

Incredibly, there is no system of international burden sharing in international refugee law. The Refugee Convention speaks about the importance of sharing, but incorporates no mechanism to make it happen. Northern States each year spend at least $12 billion to process the refugee claims of about fifteen percent of the world's refugee population, yet contribute only $1-2 billion to meet the needs of the eighty-five percent of the world's refugees who are present in comparatively poor states.

The Office of the United Nations High Commissioner for Refugees each year seeks these voluntary contributions from Northern states, which are distributed in the South—but it has no guarantee of such funds. Nor is there a guarantee that whatever monies can be raised will be equitably distributed. Even as the Yugoslav crisis was winding down, for example, UNHCR was still spending more in the former Yugoslavia than in the whole of Africa, which has four times as many refugees. This is not the fault of UNHCR officials. The organisation is controlled by a governing body of states, which presently includes India, but which is clearly dominated by the wealthy states of the North. As the expression goes, 'he who pays the piper calls the tune'.

Partly out of justifiable frustration, and partly out of a combination of fiscal desperation and largely misguided nationalism, I regret to say that too many Southern states are now also engaging in the violation of international refugee law. In Western Africa during the summer of 1997, for example, Liberian asylum seekers were forcibly deterred before their boats could reach the ports of asylum states. Only somewhat more subtly, many states in the South effectively starve refugees out. They make it impossible for refugees to remain by cutting food rations, by imprisoning them behind barbed wire, and otherwise making their lives impossible. For example, the United Nations Human Rights Committee has recognised that India, notwithstanding all of its historical generosity to refugees, has recently engaged in tactics of this kind *vis a vis* less favoured refugee populations. My point is not to single India out for

condemnation, but to make clear that there are very few states today that conscientiously and consistently respect the tenets of international refugee law. We are all pulling back. We are all contributing to the breakdown of the protection system.

Things got so bad by the mid-1990s that UNHCR opted to embrace a very ugly concept known as the 'right to remain'. The 'right to remain' proposed that the focus of international attention should be on 'fixing the problems' where refugees originate, rather than worrying so much about the legal rights of involuntary migrants. There is, of course, nothing wrong with a serious commitment to the eradication of human rights abuse and other causes of refugee migration. But this ought not to be seen as an alternative to the duty to protect whoever persons are able to leave situations of danger, until and unless the 'root causes' of the problems there are in fact eradicated. The 'right to remain' sets up an artificial dichotomy between a commitment to address problems and to assist suffering persons. In fact, these are parallel projects that ought not to be traded off, but rather simultaneously pursued. Refugee law focusses on palliation, while other aspects of the United Nations security and human rights infrastructure are intended to address the causes of flight.

In practice, the 'right to remain' philosophy has manifested itself in some very horrible ways. When Turkey closed its borders to Kurdish asylum seekers, a so-called 'no fly zone' was declared in Northern Iraq. This did not, however, prevent Saddam Hussain from entering the off-limits area without notice or opposition. The 'right to remain' was also invoked when Germany and others refused to continue admitting Bosnian refugees. It led to the establishment in Bosnia of 'safe havens', which became sites for the slaughter of thousands of innocent civilians. Most recently, the insistence of French authorities on attempting to 'protect' would-be Rwandan refugees inside their own country through *Operation turquoise* led to the massacre of persons still vulnerable to their persecutors.

The bottom line is that in a world in which claims of territorial sovereignty remain powerful, and where the international will to enforce human rights is both selective and easily forgotten, the 'right to remain' is unworkable. There is simply no commitment on the part of powerful states to empower the United Nations routinely to intervene against human rights abuse in all parts of the world. More fundamentally, we have yet to address the serious potential for politically mis-directed interventions purportedly undertaken in the name of human rights. In this state of affairs, it is unethical to pretend that we are anywhere close

to being able to de-emphasize the right to seek asylum in favour of some overarching commitment to end the suffering that induces involuntary migration.

Yet UNHCR was prepared not only to accept, but actually to champion, the 'right to remain'. This shift may have resulted from a sense that the organisation had no options in the face of the refusal of the majority of states—in both the North and the South—to live up to the fundamental precepts of the asylum system. If so, I believe the UNHCR made a grave error. Its institutional responsibility was and is to affirm without equivocation the critical importance of a legal regime to ensure the welfare of involuntary migrants. If states are failing to abide by their freely assumed duties towards refugees, the answer is not to accommodate their breaches. It is instead to be creative *about protection:* the continuing importance of refugee law should be unfailingly emphasized, but an openness shown to new ways in which the rights of refugees and the legitimate concerns of host states can be successfully reconciled. The ways in which this transition can be achieved will be the subject of my remarks tomorrow.

In sum, I think we have reached a very low point, where most refugees in the world, if they are protected at all, are protected on the basis of discretion. Sometimes discretion works well. Many times it does not. It certainly provides for no accountability. Some have argued that we would be better off just to abolish refugee law and let each state do what it wants to do, to the extent it wants to do it. I believe that the shift away from legal accountability is a recipe for human disaster.

At an ethical level, it is also fundamentally objectionable. The repudiation of legal duties towards refugees is wrong because it allows governments to benefit from the extraordinary authority vested in them under the nation-state system, without assuming responsibility for the most visible evidence of the failings of that system, refugees. If the authority of the state follows from a belief that it is the means by which the most basic interests of human beings can best be advanced, then surely there is a collective duty to respond in solidarity to tragic reality that, in practice, governments often act with blatant disregard for the source of their own legitimacy.

I think that the time is right to get back to basics. Refugee law is not and, in my view, ought not to be a means by which to operationalise some general notion of 'freedom to international movement'. The assertions of many Northern advocates notwithstanding, respect for refugee law does not amount to an endorsement of migratory freedom. If we resist the compromises inherent in refugee law, and instead demand

that it function as a 'back door route' to permanent immigration, I fear that states will pursue whatever alternate control strategies are open to them.

Equally dangerous are the recent calls of some Southern advocates to exploit refugee law as a means to advance calls for global economic justice. Politically and philosophically, I endorse the notion of a 'new international economic order'. But I deeply resent efforts to conflate that struggle with calls for burden-sharing of the kind necessary to make the refugee protection system functional. As I will elaborate tomorrow, I believe that a compelling case can be made today for a system to share burdens and responsibilities that accrue under international refugee law. We risk undermining that vital effort if collectivized responsibility in this field is said to be acceptable only if constructed on the basis of the kinds of principles that would promote a fundamental restructuring of global economic relations.

I am, therefore, arguing for a middle ground position that rejects the trend of states and UNHCR to substitute discretion and vague commitments to 'root causes' intervention for a solid and binding duty to international refugee law. I am equally opposed to the rigidity of those in the advocacy community who use refugee law as the battleground for either a fulsome notion of migratory freedom or comprehensive global economic reform. My goal, modest as it may appear, is to work within the prevailing nomative and political realities to assert the right of desperate human beings to flee intolerable harm, and to be protected in dignity until and unless the risk in their home country is ended. I want, in other words, to re-invigorate the sluice gate in the dam of immigration control.

My vision of a workable system of international refugee law stands in parallel to, and supports the global human rights project. Whatever success may (or may not) be achieved in relation to the broader objectives of eradicating injustice and promoting individual and collective freedom behind sovereign borders, I can see no ethical basis for failing to ensure that the international community at least reaches out to the victims of abuse who are—by virtue of trans-border migration —both legally and practically within our reach.

In a world in which states tend to pontificate about human rights, but are able to do very little in practical terms to make human rights meaningful in the lives of most people, refugee law is a minor miracle. It is without question the international community's single most effective mechanism of human rights protection. Literally, millions of people have reached safety because of the existence of this body of law. It is also one of the very few ways in which international law actually engages

with the real concerns of real human beings. That is something valuable and worth saving. The refugee rights regime creates a dynamic mechanism of accountability. Refugee law enforces a "dialogue of justification" in which governments agree to answer for how they address the needs of involuntary migrants. This is why I am committed to finding a way to making international refugee law relevant again."

## VI. SESSION II — SUMMARY OF FIRST DAY'S DISCUSSION

Professor N.R. Madhava Menon, Member, National Law Commission, summarising the first day's discussion, said:-

"I would like to recapitulate what I could gather are the major emerging propositions in the discourse we had on the first day. There is a near unanimity of opinion on the inadequacy of the prevailing refugee law system which has evolved in a totally different context after the cold war with objectives far removed from providing relief to refugees and protecting their basic rights. The inequities in the system was located partly in the international economic order and the role played by countries in the North through international financial institutions. As such, Professor B.S. Chimni of JNU felt that a universal law applicable to the same degree both to the North and to the South may not be acceptable. Others felt that a more acceptable approach would be an appropriate domestic law or at best, a regional enforcement system. This divergence in perspectives and approaches I felt is a basic dilemma in the search for solutions. If the causes of refugee flows are more due to external factors as Professor Chimni would contend, blaming countries of origin or asking them to submit themselves to international monitoring is like adding salt to the wounds. Professor Hathaway himself said in his presentation that ideas like "right to remain" or "right not to become refugees" or the so-called "safe havens" are ugly concepts, to use his expression, which are non-answers and cannot work to the benefit of refugees. So the first benchmark is more a structural one, where the basics of refugee law need to be revisited keeping in mind the ground realities of intenational political economy.

Another dilemma which emerged from yesterday's discourse is the need to protect the basic human rights of refugees to which the international community subscribes unequivocally, and introduce a system of accountability which every regime must necessarily have. It is in this sense a management question where the basics are not so much in question as the mechanics of implementation. Today we have a system which spends time and money five times more, as I understand

from Professor Hathaway, on determination of who is a refugee than on providing relief to the refugees. Today we have a system which is attractive on paper, but disastrous on the ground with decreasing rates of accountability. We have a system where we expect from the UNHCR too much without providing adequate resources or capabilities. Hence the search for alternatives which are practical in the given circumstances and accountable at least to a reasonable degree.

A third and the final proposition which I could gather yesterday is that time is running out and international refugee law will have a natural death if it is not redeemed by appropriate changes in the very near future. This will, in fact, be a greater disaster than the present situation.

The legal community, and more importantly international lawyers, have an obligation to come up with some alternative solutions which are practical, fair and accountable. A model of a domestic law drafted and circulated is one such solution. An example of regional co-operation which was manifested in the Indo-Bangladesh Treaty is another approach to the problem. A global solution is promised by Professor Hathaway, and that is what we are going to hear and analyse today."

## VII. 'NEW APPROACHES TO SOLUTIONS'

Statement by Professor James Hathaway

"Thank You, Professor Menon, for that stunningly provocative summary of where we were yesterday, which I think situates the debate quite nicely. Before I outline my views on how to invigorate the global refugee regime, I would like to take a moment to engage with a couple of the questions you put on the table, arising from yesterday's discussions.

First, is it even worthwhile to attempt to reinvigorate the international refugee protection system, or does it make more sense to pursue regional or national alternatives? I feel quite strongly that these are not mutually exclusive alternatives, but that reliance on domestic law without accountability at the international level poses far too many risks for the human beings involved. Given the too often self-serving goals pursued by national governments, I fear that the absence of international accountability would seriously threaten the welfare of refugees. Indeed, it was the insufficiency of purely national efforts that led to the development of international refugee law in the first place.

You may be interested to know that the governments (of both North and South) that contributed to our research project, 'Toward the Reformulation of International Refugee Law', were unanimous in

recommending against any renegotiation of present-day legal standards on refugee protection. Their concern was that it is important for national governments to have a firmly protection-oriented international law to serve as a bulwark against retrogression. Officials from a variety of states insisted that many of the negative shifts that have occurred in recent years had their roots in xenophobic populist politics, and that only the existence of the Refugee Convention prevented much more drastic reductions in the quality of protection. Even good citizen governments are sometimes tempted or pushed to act ungenerously. I can see no reason for an honestly well-intentioned state to resist participation in international law's dialogue of justification, which is all that refugee law establishes by way of an accountability mechanism.

A second concern, raised by Professor Chimni, is whether it is appropriate to focus effort on resuscitation of a palliative regime for refugees in view of the partiality of that effort. The failure to address refugee needs, in other words, is only part of a much larger problem of social and economic injustice in the world. We ought not, I understood him to suggest, allow ourselves to be sidetracked from that larger struggle in order to revitalize the refugee protection system.

The answer to Professor Chimni's critique, I believe, lies in whether the project to reinvigorate refugee law in some sense detracts from the parallel struggle to achieve global justice, or whether it actually supports that effort. In principle, it makes little sense to suggest that the protection of victims is *per se* inconsistent with a simultaneous commitment to secure global social and economic reform. Indeed, some scholars have argued that it is often confrontation with the human faces of injustice—in the person of refugees—which predisposes the citizens of powerful states to think twice about the consequences of their relative privilege.

But even if this is not empirically clear, is there not something ethically compelling about struggling in parallel to change the world even while doing what we can for those who suffer today? And if the persistence of sovereignty prevents the international community from accessing every at-risk person, should we not be committing ourselves—as refugee law does—to meeting the needs of at least those casualties of injustice that are legally and logistically accessible to us? Particularly, if—as I have suggested—a major part of the effort to re-energize refugee law requires adoption of solid systems of international burden and responsibility sharing, might not refugee law reform actually be a means of promoting enhanced global economic justice?

The focus of my talk this morning is how I believe we should go about revitalising the 'gate in the dam of immigration control' we

discussed yesterday. How do we resuscitate a refugee protection system which focuses on palliation, which provides relief to suffering human beings until and unless it is safe for them to go back to their homes? Refugee law should not aspire to address the underlying root causes of migration—that is not the responsibility of the refugee regime. I believe it would be a very serious mistake to put all our eggs in the basket of root causes, thereby watering down our commitment to the human beings who suffer in the meantime.

Refugee law was, and is, intended to be an unglamorous, palliative regime. Its purpose is to connect us to real human beings. It was not designed to be a macro-political, fix-the-problem system. International human rights law and the collective security regime can and should be invigorated to perform those roles. My concern, in contrast, is how best to provide at least some measure of immediate human rights protection for those who are able to flee their country, until and unless it is safe for them to return.

Yesterday, we discussed various problems in the current system: denial of access to refugee protection; refusal to honour the rights of those refugees able to enter an asylum country; and finally, resort by UNHCR to 'the right to remain' at a time when few countries were prepared to remain open to refugees. The bottom line of evolution we discussed yesterday is that the international refugee system today really does less and less good for fewer and fewer people. The rights which the Refugee Convention grants to all refugees are, in reality, extended to only a minority of those entitled to protection.

For the last five years, I have been privileged to direct a research project which has involved more than one hundred persons from many different fields and from all continents, united by a determination somehow to make international refugee law relevant again. There were only a few non-negotiable assumptions of the project.

First, it was an assumption of the research that barriers which deny access to asylum should be dismantled. Anybody who is, in fact, a refugee ought not to be prevented from securing access to asylum. The various measures we discussed yesterday designed to block access—the *non-entrée* schemes—are legally and ethically repugnant. If international law grants refugees a right to protection, it is duplicitous to establish systems intended to prevent refugees from accessing what we have promised them through international law, to wit, protection.

Second, the goal of the system should be to ensure that refugees are the beneficiaries of internationally supervised rights, not treated merely as objects of charity or discretion. Protection should, in other words, be

real. It is not enough simply to be admitted to a country. Once refugees arrive, they are entitled not only to the benefit of the principle of *non-réfoulement*, but also to core civil, political, socio-economic, and cultural rights.

Third and finally, the reformulation project is committed to implementation of refugee law on the geopolitically inclusive basis so that need, not location, is the primary determinant of access to protection. Wherever a refugee is in the world—North, South, East or West—there should be fully equivalent access to rights regarding protection.

So long as these core commitments were respected, I view any proposal for reform as open to debate. In sum, our goal was to find a way to safeguard the essence of international refugee law—namely, to ensure that those who have no choice but to flee meet with hospitality rather than antagonism.

The first question which the research considered was why it is that the refugee law system is experiencing failure. Why are states that have chosen to obligate themselves to ensure access to rights regarding protection increasingly inclined to breach those duties? While any succinct answer will be over-simplified, we identified two core concerns.

First is a perception by many states that the admission of refugees has become an uncontrolled back door route to permanent immigration. In other words, rather than being a gate in the dam of immigration control, governments have come to see refugee law as something of a breach in that dam. They argue that the refugee protection system is abused by persons who migrate for reasons that have little or nothing to do with human rights protection, and a great deal to do with a desire simply to seek a better or different life elsewhere. You will recognise this as a preoccupation that resonates most strongly in the North, but increasingly in the South as well.

The other major critique is that the real costs of providing protection are not equitably shared. The argument is that under international law, the sole country where refugees arrive has complete, 100 percent legal responsibility to meet all of those refugees' needs, whatever its own circumstances. The notion that accidents of geography should dictate who has the responsibility to fulfil what is, in principle, a universal obligation, is both offensive and unworkable. This concern is voiced primarily, but not exclusively, by those in the South.

I have reframed these concerns as first, the absence of a solution orientation and, second, the problem of individuated state responsibility. The absence of a solution orientation speaks to the inadequacy of the present mechanisms of refugee law to deliver *human rights protection*

*for the duration of risk*, the fundamental premise of the whole system. Refugee law was not intended to function as an alternate migration path; it is supposed to facilitate migration as a means to the end of protection. In theory, refugee status comes to an end when safety is restored in the country of origin. Yet the mechanisms of the refugee regime do very little to advance that goal, leaving asylum countries saddled with what amounts to an externally imposed and wholly unselective permanent immigration scheme.

The withdrawal of governments from their duties of refugee protection makes clear that states will not abide by the principles of a refugee regime which they believe operates in practice to subvert migration control systems. Until and unless governments reverse their stance against open immigration, we have a stark choice. We can either find a practical way to disentangle refugee protection from immigration, or refugees will continue to confront a web of deterrent and rights-abusive measures designed to avoid their arrival or presence in asylum countries. Refugees cannot afford the price exacted by those who refuse to confront the untenability of an automatic linkage between refugee status and a right of immigration.

The second problem—individuated state responsibility—follows from the failure to find ways to implement the Refugee Convention's commitment in principle to treat refugee protection as collectivised duty of humankind. The preamble to the Refugee Convention, as well as numerous 'soft law' standards approved in the nearly 50 years since the Convention came into force, call for practical means to share-out burdens and responsibilities. Drawing on precedents in other areas of international law, this would logically imply some allocation of roles based on relative abilities and resources. To date, however, there have been only situation-specific attempts to institutionalize sharing of this kind. In the result, governments confronted with a refugee flow cannot safely rely on any assurance of external assistance, and, therefore, frequently act to preserve their own self-interests, even at the cost of the most essential security of refugees. It is clearly wrong to put governments in this prisoner's dilemma.

After identifying the absence of a solution orientation and insistence on purely individuated state responsibility as the two fundamental gaps in implementation of the refugee law regime, we turned our attention to practical responses that could address these failings. Again, the objective was to ensure a functioning 'gate in the dam of immigration control' that would allow at-risk migrants unfettered access to at least the core protections of refugee law—namely, dignity and rights regarding protection for the duration of the risk. This approach rejects the

assimilation of all refugees to permanent immigrants. It also acknowledges that it would be unreasonable to insist that every government in the world, whatever its own circumstances, should be expected to give refugees absolute priority over the needs of its own citizens. Absent these basic concessions, I believe there is no possibility to revitalize international refugee law.

Mid-way through our research, consensus emerged that these objectives should be pursued without undertaking the immediate renegotiation of the Refugee Convention, for two reasons. First, there was a near universal preoccupation that any re-opening of the treaty would, in an era of vibrant nativism, likely reduce the overall level of protection guaranteed to refugees. Second, and most important, it was agreed that the Refugee Convention poses no formal impediment to a shift towards solution oriented, and collectivised responsibility. Indeed, as I mentioned earlier, the Refugee Convention already speaks to both the notion of refugee protection as limited to the duration of risk, and the principle of a shared, universal duty to protect refugees. It simply fails to stipulate the means by which these two commitments are to be implemented in practice. Even the contributors who favoured full-scale global reform (for example, to broaden the refugee definition) were able to see the value of confidence-building by an initial programme of reform that focussed on structures of implementation.

In response to the absence of a solution orientation in the refugee law system, the approach should be to endorse a human rights defined status for refugees. I have already described the demise of the interest-convergence between refugees and traditional Northern asylum states. A comparable, if less radical, turning away from openness to refugees is also occurring in Africa (the continent which both produces and receives the greatest share of refugees). Apartheid-era solidarity is quickly waning, and a new generation of leaders has embraced the validity of even artificial and colonially imposed borders. In the result, the historical African tradition of hospitality towards refugees, in which they were by and large simply allowed to arrive and to remain for as long as they wished, is falling by the wayside. In some other regions—notably East Asia—there has never been a willingness to receive other than a small minority of refugees for permanent integration.

In both North and South, there is a growing resistance to the proposition that refugees should be allowed to both arrive freely, and to stay indefinitely. If unhampered arrival is to be preserved—which I believe must be our primary goal, access to asylum—then we have a responsibility to give serious attention to means by which the duration of stay can be constrained in a way that is reconcilable to legitimate

reception-state interests. I believe that it makes sense to endorse precisely what the Refugee Convention mandates.

A person becomes a refugee when he or she cannot safely return home by reason of a genuine risk of serious human rights abuse. If and when that risk comes to an end by reason of a 'fundamental change of circumstances' that is both effective and durable, refugee status is deemed to have ended. This formula avoids the charge that refugee status is a 'back door' to permanent immigration, yet ensures that asylum continues so long as it is unsafe to return to one's state of origin. It is a fair compromise between the needs of refugees, and the migration control goals of states.

If we resist this compromise by insisting on the routine, permanent integration of all refugees, I believe the result will be to encourage governments to prevent access to asylum, or at least to remove refugees prematurely. By all means, encourage governments and the citizenry in general to take a more generous view of the claims of 'outsiders' to join new national communities. But refugees ought not to be held hostage to what will be, in my view, a long and difficult process of social transformation.

Refugee law is not about facilitating permanent immigration; it is rather a system of human rights protection. Refugees receive a necessity-defined trump on the usual rules of migration control only because they do not have the option to stay in their own countries. They have to be let in because it is unsafe for them to stay where they are. There is, however, no logical connection between that trump card on immigration control and an automatic right to permanent immigration. There is a clear right to come in for the duration of risk, but that is not the same thing as entitlement to come in and stay forever.

There is, however, no excuse for denying refugees entry, or for treating refugees badly once they come in. They may not be warehoused behind barbed wire, they may not be denied the right to work, they must be allowed to remain with their immediate family members. But this duty to respect the rights of refugees does not imply access to permanent reception. Repatriation, if and when the conditions for cessation of refugee status are met, is perfectly legal. It need not be consented to by refugees, it must only be conducted with due regard for their human rights. This is the flexibility which international refugee law provides states that are committed to migration control; it is the *quid pro quo* extended in order to keep borders open to involuntary migrants.

The second transformation required to secure renewed respect for international refugee law is to secure a shift away from purely

individuated state responsibility. In our research, a consensus emerged in favour of revitalizing the Refugee Convention through interconnected and closely coordinated efforts at the regional and sub-regional levels. Something of a 'half-way house' between the present system's reluctance to work collectively and a fully globalized regime was thought best. While the practical and ethical arguments in favour of a unified global refugee protection regime were compelling, few believed that states would be prepared immediately to buy into such a regime. If, however, individuated state responsibility could be attenuated by generalizing and institutionalising the lessons learned from *ad hoc* programmes of cooperation, the foundation for an eventual universal reform could be laid. To start, then, we ought to strive at the sub-global level, in order that governments come to appreciate the viability and value of a more cooperative approach to refugee protection.

There have been several *ad hoc* attempts by states to cooperate with each other to allocate the burdens and responsibilities of refugee protection. The Comprehensive Plan of Action for Indo-Chinese Refugees (CPA), the programme for African refugees under the International Conference for Africa for Refugees and Asylees (ICARA), and the Latin American programme set by the *Conferencia internacional sobre refugiados centroamericanos* (CIREFCA) provide a strong empirical base from which to consider how best to share-out burdens and responsibilities in the refugee context. Some of these experiences were positive, others decidedly negative. Our research has struggled to discern the lessons of these attempts. We have combined the insights of experience into a proposed model for sharing what we believe constitutes 'best practice'.

What is this model for collectivised protection? The lynchpin for the proposed system is agreement by states to work together in what we have labelled 'interest-convergence groups' (ICGs). The point is that it does not make sense to attempt to forge false alliances, or to re-invent institutional structures. It is better to encourage already extant, functional inter-state associations to take on refugee protection as part of their mandate.

In the South Asian context, SAARC is an obvious candidate for ICG status. In other parts of the world, one might turn to formal regional organizations (such as the Organisation of African Unity, or the Organisation of American States). Sub-regional associations (SADC in Southern Africa, CARICOM in the Caribbean) could be approached, as could more loosely defined associations, such as the Commonwealth.

The goal is to encourage groups of states that already collaborate at different levels, and which have already developed patterns of reciprocal

obligation on other fronts to serve as the sites through which to operationalise a more collectivised refugee protection regime. UNHCR would be a part of each interest-convergence group, and would ideally serve as its secretariat on refugee protection concerns. There would also be a formal role for non-governmental organizations in the work of the groups.

The focus on regional and sub-regional implementation through already existing interstate structures is not perfect. Clearly some states will be left out of this system, at least initially. But because we envisage a flexible membership structure for interest-convergence groups, countries not fomally affiliated with the host organization on other issues might participate in its refugee-specific work, either routinely or in the context of a particular situation. This approach combines regional implementation of a global obligation with global supervision and domestic follow-through. It is a holistic implementation strategy, but with the focus at the regional level, at least as a first step.

In my view, the ultimate goal ought to be a system of genuinely global sharing of burdens and responsibilities. But politicaly that is just not going to happen in the short term. And if it is ever going to happen, it will happen because the regional precedent is seen to be viable and non-threatening. Therefore, the research group's suggestion was to embrace sub-global co-operation, but to bring in participation at a lower level of intensity by extra-regional states we refer to as 'outer core members' of the ICG. They would primarily provide special needs and residual resettlement opportunities, as well as guaranteed financial resources. Outer core states would, of course, still have direct responsibility towards any refugees who arrive in their territory, and could only share the responsibility if they had an agreemen with another state to do so. Their responsibility is admittedly distinct and in many ways less demanding than that of countries in regions of origin. But although it is a different kind of responsibility, it is not non-responsibility.

The actual allocation of duties and responsibilities within each ICG would be defined in general terms *before a particular crisis emerges*. The basis for the determination of fair shares among participating governments would be a concept pioneered in the context of international environmental law, 'common but differentiated responsibility'. The essence of this concept is that it makes sense for particular states to play to their strengths in contributing to the overall response to involuntary migration.

Not every government need take on every role in the protection system. For example, African countries have been extraordinarily

generous in providing first asylum and temporary protection. However, virtually none of them has been prepared to provide durable permanent integration for refugees who canot safely go home for the foreseeable future. Traditional immigration countries (Australia, New Zealand, Canada, the USA) on the other hand, have long been prepared to provide those permanent solutions, but have resisted temporary protection. Other countries (particularly the Scandinavian states) have tended to take relatively small numbers of very, very difficult refugee cases. There are other countries, such as Japan, which have contributed massive financial resources to ensure the viability of protection regime, but have done very little at the level of human protection.

The goal of a system of 'common but differentiated responsibility' is to insist that all states make a fair and proportionate contribution to the collective aim of ensuring refugee protection, even while recognising that flexibility is required in defining the roles of each. It recognizes the ground reality of different states with different capabilities and different political concerns, and draws on that constellation of capabilities to define a functional international refugee protection regime.

The only role which every state would be required to assume is that of first asylum, that is, to admit on at least a stictly time-limited basis anyone who arrives at their border. No more visa controls, no more carrier sanctions, no more interdiction, no more border guards turning people away, none of that. However, after that initial commitment to first asylum is met, states could share-out the burdens and responsibilities of refugees protection under internationally brokered and supervised agreements. Thus, the state in which the refugee arrives may not be the same country as that where temporary protection will be afforded, which will finance the costs of asylum, or in which the refugee will be resettled in the event that repatriation proves unviable at the expiration of a reasonable period of temporary protection.

Just how long can temporary protection reasonably go on? It seemed to us that two goals should be brought into balance, if possible. First, the duration of temporary protection should be long enough to revitalize a significant part of asylum capacity. If it is no more than 'a slow way of saying yes' to permanent admission, it is not worth pursuing. States will only be convinced to keep their doors open to refugees if they believe that for many, and hopefully most, admission is not tantamount to permanent immigration.

Second, we were committed to ensuring that temporary protection did not go on so long that serious psychosocial damage was caused to

the refugees themselves. Clearly, any period of temporary protection is too long for some refugees —unaccompanied minors and torture victims being perhaps the clearest examples of persons who should be diverted from the temporary protection system and granted permanent status virtually immediately. But for other refugees, just how long should they be expected to wait in the hope of a durable solution in their country of origin?

Interestingly, what little scientific evidence that exists on these two questions suggests that a 5-year maximum duration for temporary protection would be reasonable. First, a UN study of the 1980s (when, if anything, the Cold War ensured that refugee crises went on longer than they do now) showed that roughly 50% of refugee-producing phenomena came to an end within 5 years. On the other side of the equation, another study found no evidence of irreversible acculturation of Vietnamese refugees in Finland even after 5 years—surely a 'hard case' by any measure.

I want to emphasize the need for much more, and more recent, research on both counts. But this initial evidence does not suggest the ability to renew a significant part of asylum capacity through resort to rights regarding temporary protection. Indeed, if temporary protection were to be constructed as a truly empowering experience for refugees (as we have proposed), even periods beyond 5 years might be well within the bounds of reasonableness. By 'empowering temporary protection', I mean respecting the refugees' social structures, their indigenous approach to self-governance. We now very frequently debilitate refugees by subjecting them to external camp management, which takes away all their ability to organise and manage their own affairs. Empowering temporary protection is also about developing skills and resources, creating linkages with the places from which refugees have come, and perhaps most important, actually giving refugees the opportunity to test the waters in the place from which they have come in order to decide for themselves whether or not it is safe for them to return.

Once the maximum time-frame for temporary protection is identified, however, the system would incorporate a guarantee of access to a permanent solution at its end (assuming that cessation of refugee status had not occurred by that time). This would ordinarily involve the resettlement of refugees from the country of temporary protection to a state (perhaps outside the region) which had agreed to assume the residual protection role under the ICG arrangements.

The model would encourage genuinely voluntary repatriation at any point during the temporary protection phase. Voluntariness means a

well-informed and genuinely non-coerced decision to return. If and when cessation of refugee status were to occur before the expiry of the temporary protection period, repatriation could be pursued on a mandated basis. This is because if and when a person ceases to be a refugee by virtue of a fundamental change of circumstances, there is no obligation to ensure that repatriation is voluntary. There is, however, an obligation to take steps to avoid a process of return that is rights-violative in the sense of being coercive, or cruel, or risky.

A system of this kind could be operationalised without the need to amend the Refugee Convention. The Refugee Convention only requires temporary protection, not permanent immigration. We can re-assert what the Convention actually requires, namely protection for the duration of risk, with fulsome respect for the dignity of refugees.

Nor does the Convention pose an impediment to collectivising responsibility for refugees. On the contrary, its preamble already acknowledges the importance of collaboration. By pursuing collectivised protection under the auspices of the Convention, we moreover secure automatic access to a legal guarantee against rights-violative assignments of the responsibility to protect refugees. Because Article 33 of the Convention (the duty of *non-réfoulement*) would continue in full force, it would not be possible for a state of first asylum arbitrarily to send a refugee to a third state for purposes of status verification and temporary protection. Instead, because Article 33 prohibits the return of refugees to their country of origin directly or indirectly ('by any means whatsoever'), the state initiating the transfer of responsibility would be bound to inquire into the foreseeable consequences of its actions.

Where there is reason to be concerned that the quality of protection does not in fact live up to the requirements of international refugee law, the reassignment would be illegal. A state party may not send someone to a co-operating or partner state unless it satisfies itself that its actions create no risk of the person being sent back to his country of origin. Article 33 imposes a built-in safety check before any sharing can occur. For example, assuming both India and Nepal to be part of a SAARC interest-convergence group, India could not legally send refugees to Nepal if it knew that there was a real risk for them being returned by Nepal to China. India would be in violation of international law if it engaged in 'wilful blindness' to the consequences of its actions. UNHCR should be empowered under the ICG system both to supervise sharing arrangements, and to intervene against collectivised efforts which it deems contrary to the requirements of international law or the standards of the ICG itself.

I will conclude with a few remarks regarding why I believe that this model provides the basis for a politically realistic, yet rights-respecting, solution to the current crisis in international refugee law.

I think that it is in the interests of Northern states to buy into this system because it gives them the flexibility they seek to divorce the place of refugee arrival from the place where refugees will stay for the duration of the risk. It will, in other words, eliminate the notion of the back door to immigration. The legal and political challenges to present reliance on *non-entrée* tactics could be avoided altogether by ensuring that refugees are not simply sent away, but are received safely and with respect for their rights in other asylum countries (thus complying with Article 33 of the Refugee Convention).

To achieve this end, however, it will be incumbent on Northern states to enter into formal arrangements with governments in the regions of origin, entailing firm obligations both to support asylum in those regions (discussed below) and to take responsibility for special needs and residual resettlement cases. Only to the extent that Northern states agree to join interest-convergence groups in regions of origin will they secure access to a perfectly legal means by which to dissociate the place of refugee arrival from the place in which protection is afforded.

While the North has sought to avoid a direct role in the provision of asylum, it has usually shown itself willing to admit refugees on a *managed basis*. Past practice suggests that developed countries would be prepared to obligate themselves to receive even relatively large numbers of refugees for permanent resettlement, so long as their arrival can be planned for and carefully orchestrated. This kind of responsibility sharing—often eschewed by the South— is vitally important to an asylum system in which there is a commitment to bring temporary protection to an end before psychosocial harm to refugees ensues. Because of the extremely high premium which the North places on policy flexibility and manageability, it is also a politically realistic proposal.

What would implementation of this model of protection mean for the states of the South? It is not going to change the fact that most refugees are protected near their place of origin, or that most refugees continue to be produced in the Southern hemisphere. On the other hand, the shift I am proposing would provide two key benefits to the less developed world.

First, it will open up a mechanism for intra-group sharing of the duty to receive refugees. Thus, a state confronted with a refugee flow viewed as unmanageable would have the ability to assert binding duties *vis-a-vis* its regional partners to share the responsibility to provide

temporary protection (assisted by immediate special needs resettlement in extra-regional states). This would at least avoid the kind of prisoner's dilemma recently faced by Tanzania—unable to receive all the Rwandan and Burundian refugees who continued to arrive, yet anxious not to send them back to their places of origin.

Second and equally important, states in regions of origin would benefit from binding guarantees of financial support from countries distant from the refugee movements. They would no longer be forced to rely on charity, or on the hope that UNHCR will be willing and able to divert generic resources in their direction. Instead, receiving states that participate in an interest-convergence group could assert their rights under the pre-determined cost-sharing formula, and access emergency monies drawn from a standing fund on deposit with the group. The point here is to ensure that there is *differentiated* responsibility to assist refugees—it makes no sense that the people of the poor countries which receive most refugees should be expected also to pay the price of protection. That is what will change.

I think the North will provide those monies because they can be freed up by avoiding the dubious claims that presently overwhelm the formal adjudicative mechanisms administered by Northern states. If only a part of the more than $12 billion per annum now spent by the developed world to process and receive refugees arriving directly in their territories were to be reallocated to support interest-convergence group protection initiatives in regions of origin, that would be enough to fund the system. It makes sense for the North to make this investment not only because it is cost efficient, but because it is the means to secure the policy flexibility they so ardently desire.

Finally and most important, how would adoption of this approach affect refugees? Most critically it will mean that refugees will have unimpeded access to protection. The cornerstone of the model is the dismantling of all barriers to access, including *non-entrée* schemes. These will no longer be necessary because the migration control objectives of states will be safeguarded through the less intrusive mechanisms of responsibility sharing and protection for the duration of risk.

Second, there would be a re-channelling of refugee protection funds closer to places of origin. The gross disparity of the present regime in which $12 billion is spent on the tiny minority of refugees in the North, while only $1-2 billion is spent on more than 80% of the world refugee population in the South B would be ended. Most resources would be allocated to states in the regions of origin, where most refugees presently remain in any event.

True, the minority of (disproportionately young, male, and mobile) refugees now able to afford to travel to the North (and to pay the agents often needed to bypass entry controls) would see its options reduced. But the overwhelming majority of refugees would have access to radically enhanced resources during the time of protection; the communities that receive them would benefit in tandem with the refugees; the international community would have both a reason and a mechanism to supervise the quality of protection afforded; and there would be a guarantee that temporary protection would come to an end, with a firm guarantee of resettlement at its end for those who wish to get on with their lives. These are extremely important gains.

To conclude, I am not suggesting to you that this proposal to revitalize refugee law amounts to any kind of *nirvana*. I do not believe that. However, I think that it is the least bad approach to the very difficult situation in which we find ourselves. We must break out of the current impasse. Advocacy groups are wrong to insist that they will endorse nothing short of a complete right of refugees both to decide where to be protected and to have immediate access to permanent integration there. States are wrong to avoid their legal obligations to protect refugees by mechanistic deflection schemes, or by mistreating refugees in the hope of forcing them away. We have to try to find a middle ground that makes no compromise on the right of refugees to access solid and rights-regarding protection, but which can be reconciled to legitimate migration control priorities. That is, after all, the very purpose of the international refugee law regime.

A political philosopher, Joseph Carens, has argued that a truly ethical policy on refugees should strike a balance between criticality (challenging the often self-serving motives of national governments) and feasibility (ensuring that what is proposed can actually happen). An ethical refugee policy, in other words, should both compel states to reach out to the disfranchised, yet be tempered with enough pragmatism to secure their participation in the protection system. In my view, it is irresponsible to call for a version of refugee protection that amounts in practice to a free migration regime, or to a fulsome 'new international economic order'. We may feel good for having 'fought the good fight', but at the end of the day, refugees will still be suffering.

The time is right to embark upon a determined effort to accommodate the interests of receiving states to the continuing need of refugees to find safety. As international lawyers, I believe that it is our responsibility to show that this goal can be achieved without the need for formal amendment of present treaties. What is called for is flexibility and creativity in the implementation of existing obligations. A shift to

solution-oriented, collectivised responsibility towards refugees is, in my view, the best means of revitalising the 'gate in the dam of immigration control'. It is a clear way in which to move beyond the rhetoric of a commitment to human rights, and towards a practical and sustainable system that will deliver protection on a dependable and universal basis''.

# THE INTERNATIONAL COURT AND THE HUMANITARIAN LAW OF ARMED CONFLICT*

V.S. Mani**

## I. INTRODUCTION

The role of the International Court (an expression that ordinarily encompasses both the PCIJ and the ICJ) in the development of international law has received wide scholarly attention. Yet studies focussing on the contribution of the Court to the development of international humanitarian law are few and far between. This could be for at least three principal reasons. One, humanitarian law has not, until recently, attracted scholastic attention, as it is wrongly taken to be part of the "procedural aspects" of armed conflicts, not part of "substantive" international law as traditionally understood. Two, more often than not, that branch of the law is generally devoid of the glamour of power politics, unless of course one relates it to projects for international mechanisms to prevent and punish their violations—and these projects indeed gloat in their power political glamour. Three, the jurisdiction of the international courts being consensual, there have been only a few occasions when they have been called upon to deal with legal issues arising at the thick of clash of arms.[1]

This paper seeks to present a brief review of the rulings of the International Court on issues relevant to international humanitarian law. It is in two parts. The first part examines aspects of competence of the Court to deal with such issues, as they involve use of force by states, and criminality of violations of humanitarian law. The second part generally surveys the currently slender jurisprudence of the Court.

## II. THE COURT'S COMPTENCE AND ISSUES OF JUSTICIABILITY

The International Court is not constitutionally precluded from adjudicating upon issues arising from, or from situations involving,

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1. The earliest case in which the International Court came in face to face with some aspects of laws and customs of warfare was the *SS Wimbledón* case: *PCIJ Series A, No.1* (1923).

resort to force. Indeed, it is constitutionally adequately mandated. In the *Nicaragua* case it was argued by the United States that an "ongoing armed conflict" involving the use of armed force contrary to the UN Charter was one with which the Court could not deal effectively "without overstepping proper judicial bounds". The Court rejected this argument on three grounds. One, the term "legal dispute" is broad enough to encompass all legal disputes including those involving use of armed force, within the meaning of Article 36(2) of the Court's Statute.[2] Two, the issues of use of force and collective self-defence, raised in that case, were "issues which are regulated both by customary international law and by treaties, in particular in the United Nations Charter".[3] Finally, rejecting the contention that such issues fell beyond the pale of judicial propriety, the Court ruled that in the circumstances of the case before it, these were "issues which it has competence and is equipped, to determine".[4] These issues were justiciable, and no question of judicial propriety prevented the Court from dealing with them. It may be noted that a number of issues of violation of humanitarian laws did present themselves for the Court's determination in the *Nicaragua* case. The Court noted: "Clearly, use of force may in some circumstances raise questions of such law".[5] Even when the complainant state refrained from explictly invoking the provisions of humanitarian law as such, the Court in the same case found *suo motu* that the alleged acts of the respondent state "would appear to be breaches of the provisions of such law".[6]

The propriety of the International Court in entertaining and adjudicating upon issues of humanitarian law could face a challenge from another viewpoint. In the recent *Yugoslavia* case[7], Judge Oda argued in the Declaration that the Court had jurisdiction to deal with only the interpretation and application of the Genocide Convention, and "not the commission of genocidal acts".[8]

Such an argument could have two aspects. One aspect, which Judge Oda raised, would be : "whether international law, the Court, or the welfare of the unfortunate individuals concerned, will actually benefit

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2. *ICJ Reports* 1984, pp.431-436, *ICJ Reports 1986*, pp.26-27
3. *ICJ Reports* 1986, p.27.
4. *Ibid.*, p.28.
5. *Ibid.*, p.112.
6. *Ibid.*, p.113. The Court's power to identify and apply relevant rules of international law are indeed comprehensive in terms of Article 38(1) of its Statute.
7. *Application of the Convention on the Prevention and Punishment of Genocide (Bosnia & Herzegovina v. Yugoslavia) Preliminary Objections*. Judgment of 11 July 1996 *ICJ Reports 1996* p. 595.
8. *Ibid.*, p. 629, para 8 of Judge Oda's Declaration.

from the consideration of cases of this nature by the Court."[9] The problem with such an argument is that it is based on an untenable distinction between the interpretation/application of a convention, and the determination of whether the impugned acts are prohibited under the convention. In fact the latter would precisely depend upon the interpretation and *application* of the convention. Part of Judge Oda's contention bases itsef on the availability of access to a more appropiate forum. Determination of what acts are prohibited under international law is precisely the function of the Court in terms of Article 36(2) of its Statute. That there exists an alternative forum,[10] is equally irrelevant for the Court to exercise its jurisdiction, should it find that it has consensual jurisdiction. It is not for the Court to consider whether another forum has jurisdiction and whether the parties have even concurrently chosen that forum for adjudication.

Another issue implicit in Judge Oda's argument is whether for acts constituting crimes under international law—and violations of humanitarian law would be such acts in appropriate circumstances—, the International Court is ill-suited an adjudicative mechanism. This contention fails to appreciate the distinction between international delicts (or as Schwarzenberger would call it "international torts") and international crimes. An international crime committed by a state is necessarily a delict in the first place, although all international delicts may not be international crimes. In so far as an international delict is attributable to a state invoking its responsibility, it falls within the proper domain of the International Court. Whereas special courts, such as the potential International Criminal Court, may concern themselves with "criminal" aspects of the acts concerned, if they have appropriate jurisdiction to do so. Thus if a state commits an international crime—e.g. the crime of aggression, a consistent pattern of grave breaches of humanitarian law—, it could be brought before the international Court, provided that the Court has consensual jurisdiction, and the Court would apply the relevant law of state responsibility. The Court was, therfore, right in holding in the *Yugoslavia* case that it had jurisdiction "to give effect to the Genocide Convention with regard to the relevant facts which have occurred since the beginning of the conflict which took place in Bosnia-Herzegovina".[11]

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9. *Id.*, para 9..

10. Judge Oda refers to the Yugoslav Tribunal at the Hague and to the ILC Project on the International Criminal Tribunal.

11. *Ibid.*, at p. 617 para 34. The criminality of an international crime reflects on the culpability of the individuals involved. The delictual aspect of the crime attracts the law relating to reparation on the international plane, without necessarily adjudging questions of criminal responsibility.

While the Court may in appropriate cases between states interpret or apply rules of humanitarian law on the basis of Article 38(1) of its Statute, it cannot derive its jurisdiction to settle a dispute based solely on humanitarian law conventions such as the Geneva Conventions, 1949, Geneva Protocols 1 and 2, 1977 and the Hague Regulations on Land Warfare, 1907. The Court thus held in the *Yugoslavia* case that "the Court can find no provision relevant to its jurisdiction on any of the above-mentioned instruments".[12]

## III. THE COURT'S CONTRIBUTION TO INTERNATIONAL HUMANITARIAN LAW

The International Court's contribution to humanitarian law is surveyed in terms of a few substantive questions—the foundation of humanitarian law, the interface between the customary and conventional humanitarian law, basic principles of humanitarian law, the irreducible minimum of humanitarian law, the duty to "respect" and "ensure respect", humanitarian assistance during armed conflict, limits of self-defence, legality of weapons of mass destruction, and the Genocide Convention of 1949.

### A. Foundation of Humanitarian Law

The Court, in the *Corfu Channel* case, spoke of —"certain general and well recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war".[13]

In both the *Corfu Channel* case as well as in the *Nicaragua* case the issue was the "security of peaceful shipping". If in the former case the issue related to Albania's responsibility to keep its territorial waters clear of the mines in peacetime, in the latter case it related to the responsibility of the United States in respect of mining the territorial waters of Nicaragua in times of a civil war.[14] The Court in the latter case, cited with approval the above phrase and observed that the principles of humanitarian law are identical with these "elementary considerations of humanity".[15] Indeed, applicability of those considerations is not inhibited by the condition of war or peace; they could be more exacting in peace than in war. Principles of humanitarian law are the form which the "elementary considerations of humanity" assume during armed conflict.

12. *Ibid.*, para 39, p. 620.
13. *ICJ Reports 1949*, p.22
14. *ICJ Reports 1986*, p.112
15. *Id*

## B. The Interface between Customary and Conventional Humanitarian Law

The International Court recognised the co-existence of customary and conventional humanitarian law in the *Nicaragua* case. In that case, issues of humanitarian law arose in the context of the Vanderbilt reservation in the US Optional Clause Declaration that prevented the Court from applying multilaterial treaties to the case. The Court observed that it did not have to take a position *vis-a-vis* the Geneva Conventions 1949 in respect of the case, "since in its view, the conduct of the United States may be judged according to the fundamental general principles of humanitarian law; in its view, the Geneva Conventions are in some respects a development, and in other respects no more than the expression, of such principles".[16] The Court noted that the conventions themselves recognised the existence of "principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience".[17]

The *Nicaragua* case was a typical case in which the Court was, by virtue of the Vanderbilt reservation, precluded from applying multilateral treaties, and its search for the applicable rules of international customary law led it to three aspects of the interface between customary law and conventional law, namely (1) where areas covered by both were identical; (2) where they were not identical, and (3) where they did not overlap. It ruled that in all the three aspects, customary law co-exists alongside conventional law.[18] Yet, while considering the applicable customary law, the Court would take note of the participation of states in international conventions, as an expression of *opinio juris* among them. Thus, in the *Legality of the Threat or Use of Nuclear Weapons* case the Court observed:

> The extensive codification of humanitarian law and the extent of the accession to the resultant treaties, as well as the fact that the denunciation clauses that existed in the codification instruments have never been used, have provided the international community with a corpus of treaty rules the great majority of which had already become customary and which reflected the most universally recognized humanitarian

16. *ICJ Reports 1986*, p.113.
17. *Id.*, pp.113-114, referring to Article 63 of Convention I, Article 62 of Convention II, Article 142 of Convention III; and Article 158 of Convention IV.
18. *Ibid.*, pp.94-96, 106. For more on this, see V.S.Mani, "The Role of Law and Legal Considerations in the Functioning of the United Nations", *IJIL*, vol. 35 (1995), pp.91-118, at pp.95-96.

> principles. These rules indicate the normal conduct and behaviour expected of States.[19]

In order to establish the supporting state practice, the Court would not expect "complete consistency" on the part of state's. "The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule".[20]

In other words, the existence of a rule of international humanitarian law requires to be proved in terms of the subjective element of *opinio juris* backed by the objective element of generality of practice of states. However, if a state is opposed to a particular rule of customary law, one would expect it to make its opposition/objection explicit. Or else, it could be presumed to acquiesce in the generality of state practice. A consistent objector would, however, preclude the application of such rule *vis-a-vis* itself—unless, of course, the rule is germane to a peremptory norm of international law.

### C. Basic Principles of Humanitarian Law

Are the principles and rules of international humanitarian law part of *jus cogens*? The issue did arise in the *Nuclear Weapons* case. But the Court declined to answer it holding that the case involved the legality of recourse to nuclear weapons and the applicability of the humanitarian law to determine it, and that this did not raise "the question of the character of the humanitarian law" as such.[21]

On the other hand, disagreeing with the Court in that case, Judge C.G.Weeramantry, in his persuasive dissent, contended that the status of humanitarian law being part of *jus cogens* was germane to the question of legality of nuclear weapons (because if humanitarian law was *jus cogens*, it would follow that nuclear weapons were proscribed by necessary implications). He observed:

> The rules of the humanitarian law of war have clearly acquired the status of *jus cogens*, for they are fundamental rules of a

19. *Advisory Opinion* 8 July 1996, para 82, *ICJ Reports 1996*, p 226, at p 258
20. *The Nicaragua case :ICJ Reports* 1986, p.98
21. *ICJ Reports 1996, p. 226, at para 83, p. 258*

> humanitarian character, from which no derogation is possible without negating the basic considerations of humanity which they are intended to protect.[22]

He quoted with appoval Judge Roberto Ago's view that the rules of *jus cogens* include, *inter alia*, "fundamental rules of a humanitarian nature (prohibition of genocide, slavery and racial discrimination, protection of essential rights of the human person in time of peace and war)".[23] He then identified the following principles for the purposes of the case:-

1. the prohibition against causing unnecessary suffering;
2. the principle of proportionality;
3. the principle of discrimination between combatants and non-combatants;
4. the obligation to respect the territorial sovereignty of the non-belligerent states;
5. the prohibition against genocide and crimes against humanity;
6. the prohibition against causing lasting and severe damage to the environment; and
7. human rights law.[24]

Even without characterising the principles of humanitarian law specifically as *jus cogens*, the Court in the *Nuclear Weapons* case described them as "cardinal"[25] or "fundamental" principles. It spoke of "a great many rules of humanitarian law applicable in armed conflict... so fundamental to the respect for the human person and "elementary considerations of humanity" ...that the Hague and Geneva Conventions have enjoyed a broad accession". At the same breath, the Court said:-

> Further, these fundamental rules are to be observed by all states whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.[26]

The Court noted two "cardinal" principles contained in the texts constituting the fabric of humanitarian law, namely, one aimed at the protection of the civilian populations and civilian objects and also establising a distinction between civilian and military targets; and the

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22. *Ibid.*, Judge Weeramantry's dissent, p.496.
23. *Id.*
24. *Ibid.*, p.497.
25. Note 21, para 78, p.257.
26. *Id.*, para 79.

other: "it is prohibited to cause unnecessary suffering to combatants". Included in the second principle is the postulate that "States do not have unlimited freedom of choice of means".[27] Additionally, the Court noted "[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control".[28] In their application in armed conflict, Article 35(3) and Article 55 of the Geneva Additional Protocol I of 1977 provide "powerful restraints" on the freedom of action of states.[29] In other words, the environmental law has contributed to the emergence of a third basic principle of humanitarian law, namely, the prohibition of methods and means of warfare causing widespread, long-term and severe environmental damage.[30]

Which all of the above principles may be regarded as part of *jus cogens*? "[A] peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted".[31] In terms of this consensual definition of *jus cogens* and on the basis of the above judicial observations, it is submitted that the following principles could be considered to be *jus cogens* of humanitarian law:-

1. Protection of civilian population, civilian targets and non-combatants;
2. Prohibition of unnecessary suffering or superfluous injury;
3. Prohibition of crimes against humanity; and
4. Prohibition of methods and means of warfare causing widespread, long-term and severe environmental damage.

Human rights law will indeed apply as it does at all time, whether in war or in peace. At any rate it is subsumed in the "elementary considerations of humanity". And it stands on its own *jus cogens*—the non-derogable human rights, flowing as they do, from the fundamental rights to life and personal liberty.

### D. The Irreducible Minimum of Humanitarian Law

Is there an irreducible minimum of rules of humanitarian law applicable to all situations of armed conflict, regardless of whether they are of an 'international' or 'not of an international' character? The

27. *Id.*, para 78.
28. *Ibid.*, para 29, pp. 241-242.
29. *Ibid.*, para 31, p.242.
30. *Id*
31. See the definition in Article 53 of the 1969 Vienna Convention on the Law of Treaties

International Court examined this issue in the *Nicaragua* case. In that case, the Court was confronted with the dual status of the armed conflict. On the one hand, it was an armed conflict not of an international character in so far as it related to the conflict between the *contra* rebels and the Nicaraguan Government. On the other hand, in terms of the participation of the United States in the conflict, it partook of an international character.

The Court remarked : "Because the minimum rules applicable to an international and non-international are identical, there is no need to address the question whether those actions [of the US] must be looked at in the context of the rules which operate for the one or for the other category of conflict".[32] Referring, in this context, to the common Article 3 of the 1949 Geneva Conventions, the Court declared:-

> There is no doubt that, in the event of international armed conflicts, these rules [i.e. rules postulated by Article 3] also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts: and they are rules which, in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity"...[33]

There was only one judge, Judge Jennings, who specifically addressed this holding of the Court treating Article 3 rules to be "a minimum yardstick". He said that the Court's ruling was "not a matter free from difficulty". Indeed, he had "very serious doubts whether those conventions [of Geneva 1949] could be regarded as embodying customary law".[34] While one appreciates the difficulties which some states may have in accepting Article 3 rules (as such acceptance would imply a surrender of sovereignty in determination of the existence of a civil war), Article 3 merely reflects the non-derogable human rights law which has taken roots since 1966. The non-derogable part of the modern human rights law has become part of internatinal customary law today, and no state can legally deny any person within its jurisdiction or control the protection of his/her non-derogable rights. In that sense "the elementary considerations of humanity" justification offered by the Court in support of the Minimum Yardstick of humanitarian law is unexceptional.

32. *ICJ Reports 1986*, p.114, para 219.
33. *Ibid.*, p. 114, para 18.
34. *Ibid.*, p.537.

### E. Duty to "Respect" and "Ensure Respect"

In the *Nicaragua* case, the Court observed that Article 1 of the 1949 Geneva Conventions imposes on states an obligation not only to "respect" the conventions but also to "ensure respect" for them "in all circumstances". The Court stressed that "such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression".[35] Specifically on the US conduct in relation to the *contras* in that case, the Court held that the US had "an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four Geneva Conventions..."[36] The publication and dissemination by CIA of a manual on "Psychological Operations in Guerrilla Warfare", with the advice given to the *contras* to "neutralize" certain carefully planned targets, including judges, police officers and state security officials to incite the local population, according to the Court, "must be regarded as contrary to the prohibition in Article 3 of the Geneva Conventions, with respect to non-combatants...and probably also of the prohibition of "violence to life and person, in particular murder...."""[37]

The publication and dissemination of the manual "must therefore be regarded as an encouragement,...to commit acts contrary to the general principles of international humanitarian law reflected in treaties".[38]

### F. Humanitarian Assistance during Armed Conflict

In the *Nicaragua* case, the Court, while considering the legality of the conduct of the United States in terms of the principle of non-intervention, took note of a decision of the US Congress restricting the use of certain funds appropriated to the "humanitarian assistance" of the *contra* rebels, remarked:-

> There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or in any other way contrary to international law.[39]

35. *ICJ Reports, 1986*, para 220, p.114.
36. *Id.*
37. *Ibid.*, para 255, pp.129-130.
38. *Id.*, para 256, at p. 130.
39. *ICJ Reports 1986*, para 242, p.124.

Taking cognizance of the "fundamental principles" of humanitarian assistance adopted by the Twentieth International Conference of the Red Cross, the Court made the following "declaration as to how law applies in this respect":-

> An essential feature of truly humanitarian aid is that it is given "without discrimination" of any kind. In the view of the Court, if the provision of "humanitarian assistance" is to escape condemnation as an intervention in the internal affairs of Nicaragua, not only must it be limited to the purposes hallowed in the practice of the Red Cross, namely "to prevent and alleviate human suffering", and "to protect life and health and to ensure respect for the human being", it must also, and above all, be given without discrimination to all in need in Nicaragua, not merely to the *contras* and their dependents.[40]

While the Court emphasized the principle of non-discrimination as the hallmark of humanitarian assistance not amounting to a violation of non-intervention, it did not deal with the "procedure" of provision of such assistance in the context of a civil war or an armed conflict in relation to a territory under the jurisdiction or control of one of the parties to the conflict. It would appear that provision of assistance, in order to escape condemnation as an act of intervention, must be based on the consent or acquiescence on the part of the party in territorial control, or it must be pursuant to a consensual international community initiative in a truly humanitarian situation. The Court's reliance on the Red Cross principles would tend to support the latter, i.e., a consensual international community initiative.

### G. Self-defence and Humanitarian Law

Humanitarian law imposes mandatory constraints on all parties to an armed conflict without exception. The legality of a self-defensive action encompasses, *inter alia,* its conformity with humanitarian law. In the *Nuclear Weapons* Advisory Opinion, the Court said:-

> [A] use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in an armed conflict which comprise in particular the principles and rules of humanitarian law.[41]

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40. *Ibid.*, para 243, p.125.
41. *ICJ Reports 1996*, p. 226, at p. 245, para 18.

### H. Legality of Weapons of Mass Destruction

In the *Nuclear Weapons* Advisory Opinion, the International Court was asked to pronounce on the illegality of nuclear weapons.[42] The Court noted that "The pattern [of state practice] until now has been for weapons of mass destruction to be declared illegal by specific instruments...Each of these instruments has been negotiated and adopted in its own context and for its own reasons".[43] The Court, while specifically dealing with nuclear weapons, ruled that there existed neither "a conventional rule of general scope nor a customary rule specifically proscribing the threat or use of nuclear weapons *per se*".[44] This holding has proved to be controversial, and there is substantial support for the view that customary law renders weapons of mass destruction illegal in terms of the *jus cogens* of humanitarian law, at least at the present level of technology.[45]

The Court, however, observed that "Certainly,..., the principles and rules of law applicable in armed conflict—at the heart of which are the overriding considerations of humanity—make the conduct of armed hostilities subject to a number of strict requirements. Thus, methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited. In view of the unique characteristics of nuclear weapons...the use of such weapons in fact seems scarcely reconcilable with respect for such requirements."[46]

Evidently, the above logic of the Court would equally, *mutatis mutandis*, apply to the threat or use of all weapons of mass destruction.

At least two judges strongly dissociated themselves from the Court's inability to hold that the use of nuclear weapons is outright prohibited by humanitarian law. Judge Shahabuddeen examined the issue in terms of the principles relating to (*a*) the right of a belligerent to choose means of warfare, (*b*) the unnecessary suffering principle, and (*c*) the Martens Clause, and held that -

(a) "The material before this Court is sufficient to enable it to make a finding of fact that the actual use of nuclear weapons is not admissible to the sense of the international community;

42. For a symposium on the Court's Advisory Opinion, see *IJIL*, vol.37 (1997), pp.149-261.
43. *ICJ Report 1996*, p. 226, at p. 248, para 57.
44. *Ibid.*, para 74, p.256.
45. See the *IJIL* symposium, note 42.
46. ICJ Reports 1996, p. 226.

on the basis of such a finding of fact, it would lie within its judicial mission to hold that such weapons are not admissible "means of warfare" within the meaning of the law".[47]

(b) Even if the unnecessary suffering principle is restricted to combatants, "the principle is breached in so far as combatants are affected by the use of nuclear weapons".[48]

(c) Given the "state of the public conscience", "the Martens Clause operates to prohibit the use of nuclear weapons in all circumstances".[49]

Judge Weeramantry points out in his dissent that "Every weapon proscribed by international law for its cruelty and brutality does not need to be specified any more than every implement of torture needs to be specified in a general prohibition against torture. It is the *principle* that is the subject of customary international law".[50] To him the Martens Clause "means that beyond the domain of express prohibitions, there lies the domain of the general principles of humanitarian law". It follows that "If an act of war is not expressly prohibited by international agreement by customary law, this does not necessarily mean that it is actually permissible."[51] According to Judge Weeramantry, "Humanitarian law reveals not a paucity, but rather an abundance of rules which both individually and cumulatively render the use or threat of use of nuclear weapons illegal."[52]

### I. The Genocide Convention, 1949

The Court, in the *Reservations to the Genocide Convention* case, recognised that "the principles underlying the Convention are principles which are recognised by civilised nations as binding on States, even without any contractual obligation".[53] They are at once part of humanitarian law. The Court also underscored the "universal character both of the condemnation of genocide and of the co-operation required "in order to liberate mankind from such an odious scourge" (Preamble to the Convention)".[54]

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47. *Ibid.*, p.402.
48. *Ibid.*, p. 405.
49. *Ibid.*, p. 411.
50. *Ibid.*, p. 492.
51. *Ibid.*, p. 493, quoting D. Fleck.
52. *Ibid.*, p.496. The principles, he examined, are already noted above, in the context of the discussion on *jus cogens*.
53. *ICJ Reports 1951*, p.23.
54. *Id.*

Interpreting its holdings in the *Genocide Convention* case, the Court observed in the *Yugoslavia* case:-

> It follows that the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*. The Court notes that the obligation each State thus has to prevent and punish the crime of genocide is not territorially limited by the Convention.[55]

Nor is the applicability of the Convention limited to acts committed "within the framework of a particular type of conflict". The Court noted further in the *Yugoslavia* case that the Convention applies to acts of genocide which states "must prevent and punish independently of the context of "peace" or "war" in which it takes place". Equally, "the Convention is applicable, without reference to the circumstances linked to the domestic or international nature of the conflict...In other words, irrespective of the nature of the conflict forming the background to such acts, the obligations of prevention and punishment which are incumbent upon the States parties to the Convention remain identical".[56]

In the *Yugoslavia* case, the Court also had occasion to examine the scope of state responsibility under the Convention. In that case Yugoslavia argued that the Convention did not encompass the question of responsibility of a state for acts of genocide perpetrated by the state for itself, but was confined to such acts perpetrated by individuals. Rejecting this contention, the Court, with reference to the Article IX phrase, i.e., "the responsibility of a State for genocide or for any of the other acts enumerated in Article III", ruled that the phrase "does not exclude any form of State responsibility". "Nor is the responsibility of a State for acts of its organs excluded by Article IV of the Convention, which contemplates the commission of an act of genocide by "rulers" or "public officials".[57]

How crucial is the proof of "intent to destroy" *vide* Article II of the Convention for a determination of an act of genocide? The issue briefly came up in the *Nuclear Weapons* case. The Court noted in that case that some states cited the law relating to genocide to highlight the illegality of nuclear weapons. It pointed out that "the prohibition of genocide would be pertinent in this case if the recourse to nuclear weapons did indeed entail the element of intent, towards a group as such, required

55. *Yugoslavia* case (*Preliminary Objections*),ICJ Reports 1996, p. 595, para 31, p.616
56. *Ibid.*, para 31, p.615.
57. *Ibid.*, para 32, p.616

by the provision quoted above [i.e. Article II]. In the view of the Cour it would only be possible to arrive at such a conclusion after havin taken due account of the circumstances specific to each case".[58] Ordinarily, a determination of existence or absence of "intent to destroy would necessarily be contextual. However, where the context is th scenario of use of weapons of mass destruction, is the fact of deliberat actual use of such weapons not sufficient to infer an "intention to destroy", as the user must be held to be reasonably aware of the likely consequences of use of such lethal weapons?

## IV. CONCLUSION

The above survey of the slender jurisprudence of the Court mainly encompasses *Corfu Channel* case, the *Reservations to the Genocide Convention* case, the *Nicaragua* case, the *Nuclear Weapons* case and the *Yugoslavia* case. The Court indeed missed further opportunities in two Nicaragua-related cases[59] and the *Pakistan-India Prisoners of War* case,[60] as these cases were withdrawn by the parties concerned. They involved interesting issues of humanitarian law. The Indo-Pak case raised questions about the custody of prisoners of war, the duration of such custody and also issues of trial of war crimes and genocide. In the *Yugoslavia* case, the Court is confined to issues of genocide in view of its jurisdictional limitations, although the Bosnian Application had raised a abroad spectrum of issues of humanitarian law.

Even as a few of the Court's pronouncements, say in the *Nuclear Weapons* case, have proved to be controversial, the Court has, by and large, acquitted itself commendably in contributing to the development of humanitarian law.

58. *ICJ Reports 1996*, p. 226, para 26, at p. 240.
59. *Border and Transborder Armed Actions* : (Nicaragua v. Costa Rica), *ICJ Reports 1987*, p.182; (*Nicaragua v. Honduras - Preliminary Objections*): *ICJ Reports 1988*, p.69; Final Order, *ICJ Reports 1992*, p.222.
60. *Trial of Pakistani POWs*. Order *ICJ Reports 1973*, p.347.

# SPACE TOURISM : SOME LEGAL IMPLICATIONS

G.S. SACHDEVA*

## I. INTRODUCTION

Mankind has well nigh reached the threshold of technology where commercial space travel[1] appears just round the corner. The hybrid space shuttle[2] has since undertaken scores of successful missions and its technical competence and effective reusability as an aero-space vehicle of transportation has been proved beyond doubt. Similar projects like "Delta Clipper" and Venture Star, as user-friendly civilian spacecraft, are also on the anvil or under trial. Promising reports are emanating from the sponsors holding out an assurance that the operation of space travel in the first decade of the twenty-first century is a very tangible possibility.

On the other hand, enterprising organisations have carried out extensive market research in the US, Japan and Germany and have thrown up spectacular results. In the U.S. there is a sizeable section of people who are willing to pay upto US $ 1,00,000 for a journey in space. In Japan, a large number of responses revealed an aspiration to make at least one journey in space in one's life time and they have the capacity to finance it out of their life-time savings and other resources. In Germany also people have expressed longings similar to those from the US and Japan.[3]

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1. Space travel is not new to Indian psyche. Native sages and rishis are known to have transported themselves through space by their spiritual feats and yogic skills. Ancient books and religious scriptures e.g. the Vedas and Guru Granth Sahib are replete with references which are not sheer mythology but reflect authenticity from intuitive knowledge. Also refer V.S. Mani "Space in Ancient India" in V.S.Mani, S.Bhatt and V.B. Reddy (eds.), *Recent Trends in International Space Law and Policy* (New Delhi, 1997), p.17 ff.

2. The shuttle is an aerospace vehicle of hybrid variety—it can take off as a rocket and land back as an aircraft. Thus this spacecraft offers promise of reusability. The first shuttle vehicle named "Columbia" was launched by the US.

3. Refer reports from Shimizu Corporation and Obayashi Corporation of Japan. Similar projections have been made by NASA in *NASA Watch*, update 7 August 1998 while referring "to space tourism and other non-traditional uses of space". Efforts in this direction are also being made at the International Institute of Tourism Studies at the George Washington University, USA.

On 22 October 1997, an advertisement appeared on CNN television network offering space rides for sale at US $ 98,000 and another one on 25 May 1997 had announced "Honey-mooning in zero gravity—Japanese plan hotel in space". A Reuter release of 31 December 1997 reported, "First tourists to blast off to space in 2001". All this shows a popular upsurge of interest in space travel and that enterprising corporations are fondly looking towards this highly lucrative and fast expanding new business frontier which seems to have unfathomable market potential and an inherent economic multiplier effect. It thus appears certain that space transportation will be the industry of the twenty-first century. The harbingers of space tourism are already visible and active.

Any mode of transportation, when commercialised and declared open to the public as a service, carries with it several obligations and liability for the carrier, rights and duties for the users and certain regulatory responsibilities devolve on the state as well as on the relevant international organisations. Likewise this mutual-obligation syndrome of space travel is also beset with myriad legal implications resulting from international conventions and treaties, concomitant statutory law and the nascent jurisprudence relating to the space segment of international law. In this article it is proposed to discuss and highlight some of these implications of space tourism.

## II. ASSUMPTIONS

Optimism about the imminence of splurging space tourism industry is based on two assumptions viz., commercial viability of space travel and achievement of acceptable standards of safety.

The first assumption of commercial viability of space travel is dependent on development of advanced reusable launch vehicles, so that space-craft are almost as mature as airliners of today with capability to make at least a couple of flights per day and having an operational life designed for at least a decade. Technologically, the space shuttle demonstrates that passenger travel in space is feasible but costs are prohibitive. Therefore, to make this concept commercially viable we need to develop a cost-effective reusable launch vehicle which brings the cost per seat more than 1000 times lower than incurred on the space shuttle.[4] Venture Star is one such project being financed by Lockheed. Its power will be provided by X-33 which is planned to fly in 1999. It

4. It costs approximately Rs.10,00,000 ($30,000) to put one kilogram of payload in geo-stationary orbit. Refer to K. Kasturirangan. "Space : The New Business Frontier", an interview published in *Business India*, April 21 - May 4, 1997, p.55.

will be a large vertical take off, unpiloted, single-stage-to-orbit launcher with a pay load of 59,000 lbs. It has been estimated that fuel cost would constitute about 90% of the total cost of the launch because hydrogen is some thirty times more expensive per unit weight than kerosene. Therefore, economy rests in reducing the consumption of hydrogen as fuel. This could be achieved in a tri-propellant engine using kerosene or by using hypersonic air-breathing engines for early ascent. Engineering history shows that these objectives require painstaking incremental development over years of in-service evolution rather than quantum leaps in technology.[5] Nevertheless, it can be reasonably hoped that full orbital travel could be approaching the cost level of $ 10,000 in fifteen years from now.

The second assumption relates to achieving acceptable standard of safety. As of today, the element of risk is rated as 1:100. This high risk factor makes space travel an unacceptable and unattractive adventure even for die-hard enthusiasts. Though space flights shall at all times remain more risk prone than air travel, yet better design of spacecraft and development in certain ancillary areas is important and urgent to operationalise space travel. These areas comprise hazards of space debris and need for intelligent traffic control of space vehicles at the operational level. Apart from this, major material improvements are required to withstand radiation, counter risks of depressurisation, and capacity to withstand high temperature on re-entry into the atmosphere. Attainment of maturity in technical standards of safety is well foreseen, and going by past experience, appears technically achievable in the near future. At the same time, world fora need to evolve and standardise rules relating to design, tests for space-worthiness and criteria for type certification on the lines of aviation regulations. That a full-fledged space transportation service is operationally possible over the next decade appears a mere truism as of today.

## III. DEFINITION OF SPACE TOURISM

Granting the realism of above considered assumptions and despite endemic hazards beset with such an adventurous transport mode, space tourism is widely acknowledged as a distinct happening of the next decade. There is no gainsaying the fact that tourism sells an experience and space tourism is increasingly recognised as an important future market and is expected to come about surprisingly rapidly and for sure

5 David M. Ashford, "Space Tourism - How soon will it Happen?" A paper presented at the 1997 IEEE, Aero Space Conference held from 1-8 February 1997 at Snowmass, Colorado, USA

will lead to transformation of traditional space activities. We may, therefore, venture to arrive at an elementary and tentative, yet acceptable, definition of space tourism so that various legal implications of this service and associated activities can be analysed on the analogy of aviation, apart from considerations of its own peculiarities and an understanding of futuristic requirements.

For our purpose, space tourism can be defined as an offer by space transport industry to members of the general public to travel as fare-paying passengers into the space for a visual feast of fascinating views of the earth and other celestial bodies, to enjoy the thrill of a spacewalk, revel in the pleasure of micro gravity or complete weightlessness, step on the moon and relax in holiday resorts there or visit space hotels placed in low-earth orbit and equipped for accommodation, leisure, entertainment and education.[6] Needless to mention that the service so offered has to be sufficiently economical, reasonably safe and amply enjoyable.

The definition above reveals that space tourism is a composite concept and involves a gamut of activities oriented towards the satisfaction of the tourist having different objectives, purposes or expectations. Generally speaking, two major players have to act in concert to provide space tourism service. These are: first, the space-lines for transportation to the space destination and return to the earth, and second, the space hospitality industry having its infrastructure of space hotels in orbit or moon resorts or leisure colonies with adequate facilities for comfort, pleasure and entertainment as well as arrangements for replenishment of its resources like consumables and maintenance materials for its estates and house-keeping.

The salient features of this definition can be highlighted as follows:-

(*a*) Transportation in space is a service and is offered by the seller to the public in general without demur or discrimination. He solicits buyers for his services and thus obligations incident to sale attach to the seller. He may reserve his right to refuse but it has to be subject to pre-stipulated conditions, for example, reasons of health or fitness standards or aptitude for manoeuvres in zero G which must be applied equally and uniformly.

(*b*) The service is offered by the space carrier at a cost i.e. as fare paying passenger. This focusses on commercial aspects of the contract, and raises the question of liability whether absolute, strict or subject to proof of fault, negligence or misconduct. In

6. *Ibid.*

ultra-hazardous and high risk ventures, certain concessions may be claimed under the maxim of *volenti non fit injuria*, yet the seller connot be allowed to contract out his liability in full or even in part without permissible defences of *force majeure*, non-culpable neglect, plea of *abundanti cautela*, contributory negligence etc.

(*c*) Every tourist for his passage in space would have to buy a ticket which would constitute his contract with the operator and assure him a right to the journey as reserved. The terms of this contract would perforce take into account the peculiar characteristics of this travel and the imponderables involved therein. Thus certain special provisions favouring the operator, yet equitous, may have to be conceded at least till space transportation attains the maturity of air travel of today. The above would also apply to the transportation of cargo to the moon resorts, space hotels or for other purposes and a cargo-manifest appropriate for the purpose would have to be designed and formatted. Needless to mention that inherent vice or defect in the cargo or non-compliance of special packing instructions would mitigate or rule out liability under the manifest.

(*d*) In any commercial transportation activity, safety of the passengers is always of the paramount concern. This implies, *inter alia*, responsibility to maintain the vehicles to the statutory space-safety standards. Any default, advertent or inadvertent, should attract substantial compensation and damages.

(*e*) Tourism has a purpose and every tourist has an aspiration to achieve his desired object of the journey, whether thrill, leisure, pleasure, entertainment or education. The service must strive fully to satisfy the tourist by all legal means and should provide due care and facilitation. The service must be goal-oriented affording maximum comfort and adequate conveniences. Any deficiency or default would have to be compensated monetarily as far as possible.

(*f*) Tourism as an industry has an essential element of hospitality to cater to leisure, relaxation and entertainment. This necessitates placement in orbit and operation of space-hotels, entertainment centres as also resorts on the moon. This would require considerable investment to establish such facilities and operational costs to support them through replenishment of foods, beverages and house-keeping items. Outlays of this magnitude for commercial purposes cannot be expected to be made from

the state exchequers. Therefore, private enterprise shall have to address and assess this business opportunity in terms of economic viability and sustained profitability. Entrepreneurial risks are endemic and conscious investment decisions would have to be taken. It can be alluded to in tandem that private investments demand private ownership and perpetual usufructuary rights in the property so created which under the present legal framework of space environment is a neither explicitly contemplated nor can be readily acceded to. Space is a common heritage of mankind and thus no private rights can be created under the existing legal regime. This subject would be discussed at length later.

## IV. SOME LEGAL IMPLICATIONS

Space has not yet been considered as an arena for private enterprise nor viewed as a frontier for commercial forays. Space activities, so far, have been undertaken by state-funded agencies like NASA or as a function of government departments in certain countries. Lately, however, a few giant multi-tech conglomerates and multinational joint ventures have dared into the space industry and are gradually developing their independent private operations e.g. remote sensing from satellites. Some other spheres are also no longer a taboo nor a monopolistic domain of the state alone. Market research has shown that increasing areas of the space activity are falling within the ambit of economic viability and commercial feasibility. One such area so identified is space tourism which involves two major players—the space carriers and the space hospitality. Each of these operators need specific-to-type rules to regulate their activities and operations as have been evolved on the earth. Of course, these may have to be supplemented to handle specific situations in the medium of space or on the lands of celestial bodies. We are fully conscious of the fact that a comprehensive legal regime for a futuristic activity with unlimited potential for diversification and innovation can at the present juncture be an exercise with narrow comprehension and of limited value. This essay, therefore, barely attempts to draw attention to some legal implications, proffers some suggestions for the legal community to keep abreast with the technological developments and exhorts it to evolve suitable legal regimes to cope with futuristic visions.

An analysis of the salient features of the definition of space tourism has afforded enough pointers to relate them to specific legal implications which are proposed to be discussed in relation to three specific areas concerning the carriers, the hospitality and the tourists; and then raise a few general issues of common relevance.

## V. THE SPACE CARRIERS

Most of the conventions and agreements governing space activity were conceived and adopted to facilitate the governments to explore in space whereas space carrier is a concept of commercial travel and of business operations. In order to exist and grow it would need an attractive and conducive legal environment, whereas current space regulations recognise space activities by state entities only and lay down corresponding state responsibility and liability. Such a regime would appear oppressive and inhibitive for commercial activities in space. A few suggestions to improve, improvise, innovate and even to establish an altogether new tenets of space law are discussed in the following paragraphs.

### A. Regulation of Operations

The space law "conventionalised" so far treats "State parties" as the principal players in the space arena. This has been true so long but commercial activities in space cannot be expected as state ventures and necessarily have to be private corporate initiatives. The existing body of space law has made no provisions towards this progress. The only reference to space activities by entities other than the states and state agencies occurs in Article IX of the Space Treaty, 1967. Even this mention of activity or experiment by "its national" has a derogatory slant rather than encouragement. The relevant provision reads:

> If a State Party to the treaty has reason to believe that an activity or experiment planned by it or *its national* in outer space, including the moon and other celestial bodies, would cause potentially harmful interference with activities of other States Parties in the peaceful exploration and use of outer space, including the moon and other celestial bodies, it shall undertake appropriate international consultations before proceeding with any activity or experiment.[7]

Therefore, if private enterprise is to participate in commercialisation of space and operate space vehicles on the lines of civil aviation of today, then salutary legal environment has to be induced. For this purpose, a convention on the lines of the Chicago Convention, 1944 regulating flights of aircraft, airline operations and allied aspects would

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7 The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, 1967, extract from Article IX, emphasis added.

need to be internationally negotiated. More than half a century of the existence of and experience on the Chicago Convention would provide a good starting point to evolve analogous provisions and introduce specific clauses to facilitate peculiarities of operations in outer space. Some important areas could be standardisation of space worthiness of vehicles, regulation of space traffic, scavenging of space debris, need for co-operation and mutual assistance in distress as well as rescue operations in outer space, and inclusion of the existing Convention on Registration of Objects Launched into Outer Space, 1975.

### B. Liability for Accidents

In an activity so ultra-hazardous as space travel, accidents are very likely, despite state-of-the-art safety measures. The recent accident of the US *Challenger* spacecraft in which some lives were lost is still fresh in our mind. And, with increasing traffic and exponentially growing debris risks, accidents may occur due to different causes than that of *Challenger*. It is believed hat space operations will have a risk element 100 times higher than in air operations. Apparently, it may seem an unacceptable standard of safety, yet there exists brave enthusiasts and zealot adventurers who are willing to dare the high risks involved. Considering that the pioneers would voluntarily and knowingly and consciously undertake such space odysseys, the liability element and compensation level may be moderated, though not contracted out on the maxim of *volenti non fit injuria*. Needless to mention that most of the liability for air accidents is borne by insurance companies. Similar practice may evolve for space travel.

There could also be a school of thought which may advocate absolute liability of the carrier, thereby improving upon the strict liability based on *res ipsa loquitur* under the Warsaw Convention 1929.[8] Incidentally, some surmises have been made that a spacecraft with about 20-50 passengers which crashes on a city would cause less damage than an airliner carrying 500 passengers. But let us not be hamstrung or inhibited by precedence or analogy and boldly recommend innovative jurisprudence with alternative paradigms for space business law. It is appreciated that consensus may not be easy to reach on such contentious issues, yet a stand has to be formalised and the legal fraternity should for once pre-empt the technological advance and put in place a law of space travel even before its operationalisation.

8. Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw in 1929, and its subsequent amendments.

### C. Damage on Surface

There is already a convention on this subject, but as of other public space law, only the launching state is made liable, though absolutely, for any damage that may be caused by a space object on this earth. And damage "means loss of life, personal injury or other impairment of health; or loss of or damage to property of states or persons, natural or juridical, or property of international, inter-governmental organisations."[9] With the privatisation of space travel and space hospitality industry which may operate orbiting hotels and entertainment capsules and considering the high risk of accidents, the eventual liability criteria and compensation norms should be redefined and made to vest on the private operators in case any of their objects causes damage on the surface of the earth. Here again, absolute nature of liability may be stoutly contested by carriers and hospitality conglomerates, yet the need to align this to the responsible parties whether public or private is unassailable.

## V. THE SPACE HOSPITALITY

The Space Treaty, 1967 stipulates that "Outer space, including the moon and other celestial bodies shall be free for exploration and use by all states without discrimination of any kind, on a basis of equality and in accordance with international law, and there shall be free access to all areas of celestial bodies."[10] It further states that such activities, "shall be carried out for the benefit and in the interest of all countries..., and shall be the province of all mankind." The provision outlined here can be summed up under the concept of "Common Heritage of Mankind".[11] It is a laudable principle of international law and mandates to retain this medium and celestial bodies free of proprietary conflicts yet assure freedom of use thereby infusing a spirit of co-operation rather than competition. The treaty further states that "Outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means".[12]

A legal interpretation of the "common heritage of mankind" could be that outer space and the celestial bodies are *territorium communis*.[13]

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9 Convention on International Laibility for Damage Caused by Space Objects, 1971, Article I (a).

10. Note 7, Article I.

11. Rega J. Rao, "Outer Space" : A Part of Common Heritage of Mankind", in Mani, *et al.* note 1, pp. 191 ff.

12. Note 7, Article II.

13. S. Bhatt, "Reflections on Space Law in the 21st Century", in *Mani, et al.* note 1, p. 586

This connotation still concedes a shade of territorial rights albeit by the world community at large. It is thus common public property which cannot be severally appropriated or owned at least arbitrarily. I am tempted to suggest a refinement on this construction. Space and time exist *a priori* as objects of empirical perception and are almost infinite. It can, therefore, be argued that its ownership by a finite community as *res communis* would be inappropriate and infelicitous. It should rightly be deemed as *res nullius*. It, therefore, follows that outer space should be treated *communes omnium* without necessarily being a *res*.[14] From the above discussion it appears that outer space and the lands on the celestial bodies including the moon are beyond discrete ownership whether by states, organisations or individuals.

However, if the hospitality industry were to establish its own space hotels and moon resorts and other facilities with huge private investments, then they would like to be informed of the nature of subsisting rights of ownership or at least assured of a guaranteed right to free and unfettered use for a reasonably long time and for commercial proposes. Strictly, this demand may not appear legally tenable nor conforming to the existing regime under the treaty law. Yet this conflict could be partly resolved in relation to orbiting hotels, entertainment centres and construction of habitat on a celestial body by invoking Article VII of the Space Treaty. The text of this article reads that "A State Party to the Treaty on whose registry an object launched into outer space is carried *shall retain jurisdiction* and control over such object, and over any personnel thereof, while in outer space, including objects *landed or constructed* on a celestial body and of their component parts, is not affected by their presence in outer space or on a celestial body or by their return to the earth. Such objects or component parts found beyond the limits of the State Party to the Treaty on whose registry they are carried shall be returned to that State Party, which shall, upon request, furnish identifying data prior to their return." (emphasis added).

Thus the provision referred above is obliquely permissive of such use by states party to the convention, and the concept of states can be liberally interpreted by allusion to Article VII of the Space Treaty, which postulates that "States Parties to the Treaty shall bear international responsibility for national activities in outer space including the moon and other celestial bodies, whether such activities are carried on by government agencies or by non-governmental entities....The activities of non-governmental entities in outer space, ...., shall require

14. For a more detailed analysis, refer G.S. Sachdeva, "Sovereignty in the Air—A Legal Perspective", *IJIL*, vol. 22 (1982), pp 397-98.

authorisation and continuing supervision by the appropriate State Party to the Treaty". Further, there is a good faith requirement that "objects launched into earth orbit and beyond" be registered by the launching state and this information be furnished "to the Secretary-General of the United Nations, as soon as practicable...."[15]

Further, Article IX of the Space Treaty while providing safeguards against harmful effects of experiments and interference with activities by other states, admits of activities or experiments in outer space by "its nationals" as individual legal entities. Though, of course it enjoins upon the States Parties to ensure that no harmful effects ensue for the mankind.

The foregoing discussion explicates by inference and in conjunction with specific provisions of different treaties and conventions relating to outer space that non-governmental entities including individuals can launch objects into outer space, register the same with their national state and retain ownership and control over them and of course, use the same for the benefit of mankind. The spacious argument appears ostensibly tenable though the contrived justification culled out from different conventions may not be without holes, its deductive logic may contain syllogistic fallacies or there may be grey areas, yet the underlying necessity, nevertheless, remains irrefutable. It would be eminently desirable, if suitable provisions to directly meet this need could be made conventional.

Absolute ownership rights as relevant to private property on the earth are not recommended but a system of long-term leases with suitable innovative clauses to assure freedom of private enterprise in space with reasonable longevity of profitable returns on investments is definitely advocated. The issue of regulating leases could be entrusted to a designated authority on the lines of International Telecommunications Union responsible for allotment of geo-stationary slots or perhaps directly under the aegis of the United Nations. It could be a pertinent criterion that the agency applying for hospitality lease should be able to demonstrate capacity and capability to fructify the lease within, say, five years. Other regulations as necessary and germane can be evolved suitably. Legal genius is certainly not lacking on this aspect.

## VI. THE TOURIST

There are no legal provisions for tourists in space. Many jurists have not even visualised such exigencies where legal intervention.

15 Convention on Registration of Objects Launched into Outer Space, 1975, Articles II and IV.

adjudication and even sanctions may become palpably evident an circumstantially prudent. Wherever large groups of human beings liv and interact in an almost closed and constrained surroundings disagreements and conflicts become endemic to the situation. To resolv these amiably and if necessary legally is important and imperative. A couple of suggestions may, however, be put forward in the succeeding paragraphs.

### A. Complexion of Public Authority

Discipline is an important part of human life and aids good living. Similarly, good governance concerns maintenance of public order and enforcement of law. In relation to space tourism this becomes a pertinent requirement while passengers are on-board the spacecraft and again while in space-hotel or orbiting entertainment modules or while resident at the moon colony or leisure resorts.

For control while in the spacecraft, for whatever purpose, it may be meaningful to have regulations analogous to those stipulated as Rights of the Commander of an Aircraft.[16] Adaptations as necessary could be made to suit any special characteristics of space travel and peculiarities of space environment. However, to maintain public order and peace in residential areas and leisure islands on the moon, specific laws may have to be 'conventionalised'. If a proposal may be ventured, a resident Mayor could be established with comprehensive powers of penal authority and exercising adequate sanctions. He would act as the executive and the judiciary, rolled into one, but possessing a lot of common sense and due sensitivity lacing his acts and ordinances.

### B. Astronauts as Envoys of Mankind

The Space Treaty under Article V regards astronauts as "envoys of mankind" in outer space. It was laudable to accord a halo of a hero to honour the daring adventure of an astronaut. It was also logical and a valuable ruse for eliciting co-operation between the USA and USSR during the cold war period. But it makes no business sense, nor is it any good for the tourists. This clause seems to have already served its purpose. In fact, the wisdom of this dictum has already been controverted and legal basis of this status has been questioned.[17]

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16. Refer to Convention on Offences and Certain other Acts Committed on Board the Aircraft signed at Tokyo on 14 September, 1963.
17. For a detailed analysis on this, refer G.S. Sachdeva, "Astronauts: Envoys of Mankind—An Analysis of Legal Basis", in Mani, *et al.*, note 1, pp. 209 ff.

The US and the Soviet definitions of an astronaut have been found to be loose, vague and confusing. Thus in the present context every space tourist would easily qualify for the status of an astronaut and by inference envoy of mankind in outer space. Such supranational status to every tourist is legally paradoxical and fraught with intrinsic contradictions. Multiplicity of envoys can create not merely an anomalous situation but simply a perilous diplomatic order which certainly will not reflect well on the superior intellect of mankind. Therefore, in a nutshell, "the tenuous legal basis for envoys of mankind had weakened even under the treaty law and this status now remains notional and contingent, should astronauts ever encounter intelligent life in the cosmos. The use of this phrase appears symbolic and seems to carry vested interest devoid of any genuine intent of noble design. It would appear sagacious to designate only the commander of the space vehicle to act as envoy rather than create multiplicity of envoys at any given point in time and space. International community would be well advised to act judiciously and fast in this regard."[18]

## VII. GENERAL ISSUES

### A. Offences against Spacecraft, Facilities and Farers

Terrorism is rife and rampant on the globe. Cultural values have deteriorated and social perceptions have been blurred with biases. Racial groups and ethnic denominations often take to violence for perceived grievances and illusory wrongs believed to be perpetrated on them. These outfits most often select soft targets to avenge themselves. Aircraft and aviation facilities appear just such targets and for spectacular media exposure. It is logical to surmise that once space travel becomes popular, these unsocial elements would not spare this new field from their abominable acts. In aviation tightened security and anti-hijacking laws were resorted to by almost all states. Strict sanctions and vigilance have also paid, though not fully, to combat this menace. Similar security arrangements and governing laws would be necessary for the protection of the tourists, spacecraft, hotels, resorts and colonies.

It would be rather simplistic to recommended enactment of analogous laws like anti-hijacking and suppression of unlawful acts against the safety of civil aviation. Each mode of transportation has its own sensitivities which have to be tackled appropriately and imaginatively. For example, anti-hijacking measures and techniques

18. *Ibid*, p 216.

useful in aircraft may not be readily adaptable to the claustral passeng carrying space modules. Combat techniques may have to be evolv considering zero-G conditions.

Security and safety of hospitality infrastructure and corpora properties is another area of concern. Good governance over there cann be effectively controlled from the earth and the policing resources f ensuring this—whether through human, mechanical, electronic, optic and other futurist gadgets—would always be inadequate and woeful short. Therefore, the risk of slipping into an uncivil order of the surviv of the fittest in space is not an unimaginable eventuality. We have t intelligently ward off and obviate any such delinquency and formalis contingency plans to tackle such wayward happenings. And of cours such arrangements and plans shall have to be internationally devise and executed.

The liberty of the tourists has also to be guaranteed and ensured. I would be natural for them to expect a reasonable assurance of peaceful enjoyment of their leisure with commensurate freedom and desired privacy. Adequate legal adjuncts and effective enforcement machinery to maintain public peace, law and order would be necessary and should be in place before the tourism industry can flourish.

### B. Health, Hygiene and Sanitation

It has been pointed out above that the carriers offer a service of transportation to the public in general and cannot pick and choose their customers peremptorily and arbitrarily. Carriers cannot be permitted to discriminate between its customers as prospective tourists without any rational criteria or logical basis equally and universally applied. Some conditions can, of course, apply to the prospective passengers and these may relate to the health status, fitness to withstand zero-G conditions, skills to move in weightlessness and propensity to space sickness, to mention only a few. Apart from these, negative strictures may have to upheld against persons suffering from certain infectious and transmittable diseases. After all, space travel is no transportation in an open bullock cart having free access to fresh air and wide contact with *terra firma*. Therefore, health and hygienic considerations are recommended. These must be uniformly exercised to screen prospective tourists. It will be prudent to formalise the requisite health standards in consultation with the medical profession and stipulate authorities for their certification.

The considerations of hygiene and sanitation appear equally applicable to the spacecraft, hospitality modules, moon resorts and

leisure colonies. As these spaces will almost always be enclosed to create conditions conducive to human comfort and would be occupied or inhabited by numerous people at the same time, certain standards of sterile environment and cleanliness would be imperative to protect the health of the tourists. These could be analogous to the regulations that exist for aircraft and for hotels and restaurants. Other components of hospitality industry, e.g. resorts, clubs etc. can also be governed by the same or similar regulations.

### C. Safety from Space Debris

In any system of transportation, safety considerations always remain of utmost importance. The same should be equally relevant to space travel. Apart from other aspects of technical safety discussed earlier, risk from space debris constitutes a major safety issue. It is estimated that since the Sputnik of 1957, more than 5000 launches have taken place and out of these barely 500 are operational spacecraft at present. Besides the spacecraft, each launch sheds in space upper stages of motor vehicles, spent rocket motors, fuel tanks, shrouds, fairings, clamps, nuts and bolts, peeled paint and mission-related objects like the US experiment with copper needles, not to mention the trash and personal garbage thrown in the space void by the astronauts of US Gemini-10 and Soviet Salyut-7. Many of the space accoutrements abandoned in space disintegrate for unknown natural causes or because of residual fuel remaining in tanks or they could even have resulted from a controlled explosion for national considerations.[19]

It is estimated that as of today nearly 100,000 pieces of size 12 cm and above which are trackable, are floating in the space and that particles of sub mm range are likely to run into billions. And to believe that a few thousands of these pieces are radioactive, only adds to our scare and dismay. Further, all these particles are orbiting at approximate speed of 10 km/sec or about 36,000 km per hour. Thus even the smallest chip will have the velocity and impact to pierce through a space station and possibly cause the death of an astronaut. Even paint peels are known to have dented spacecraft. Thus the extent of hazard is barely imaginable and hardly quantifiable in terms of risk and effect.

The scenario as portrayed above is to highlight the magnitude and gravity of the problem which is escalating exponentially because further collisions and fragmentations are taking place each resulting in multiple

19. The USSR exploded Cosmos 1654, Cosmos 1813, and Cosmos 1906 in space ostensibly in a controlled manner lest any other state should retrieve them or data about them.

splinters that are constantly adding to the density of the cloud of space debris. Hence the need for remedial measures. One such recommendation could be to make it mandatory for the launching state to reserve adequate fuel in a spacecraft to ensure its return to the earth in a safe manner. This would reduce dead and defunct objects and thereby reduce the risk of their disintegration in space. It should be possible for the UN and other world fora to exhort and persuade the space-faring nations to adopt such preventive measures and thereby reduce pollution in space.

Another measure, albeit radical in approach, is to recommend a suitable law of salvage from space. Technology for retrieval from space, particularly the low-earth-orbit-segment, which is highly congested and most suitable for space tourism, is almost ready. Further, materials used in manufacture of spacecraft are highly expensive yet can be recycled for economy and profit without jeopardising safety. Therefore a minor impetus of commercial returns can activate a system of retrievals from space rather soon but existing law does not permit this.

The current space law enjoins states to co-operate and assist each other in rescue and recovery of space objects *et al* and return to the state of registration after due identification. Similarly, the launching state or the state which causes an object to be launched in space continues to have control over it—a right fairly comparable to private ownership. This control is zealously exercised over operational objects but once they have finished their useful role or exhausted the life span, they are abandoned and the launching states no longer wish to expend their scarce resources for actuating return of these objects to the earth with due safety. This has in consequence caused an accumulation and congestion of dead objects in space. As stated above, technology is nearly ripe for space scavenging if an economic fillip is provided which is supported by the requisite legal permissiveness. This could be in the form of a law of space salvage analogous to the provisions contained in the law of the sea. To elaborate, at sea, the long standing law of salvage allows the person who takes control of an abandoned vessel to claim ownership. This customary legal practice is honoured even today by the Admiralty Law. Thus by introducing a law of salvage in space, there could be a strong incentive for business to reclaim useful objects or even scrap material which could either be sold or recycled or even commercially disposed of as souvenirs, mementos and relics. The prospects appear inspiring but the current law does not permit such an activity. It is, however, arguable that so long as adequate safety precautions are taken to guide such debris to re-enter atmosphere and then safely on to earth, there should be no apprehension of serious risk

of damage. Therefore, if the law is suitably amended, commercial ventures in this field could mushroom and sustain profitably for a long time and at the same time reduce pollution in space to improve quality of life on the planet earth. Now a question arises whether appropriate legal provisions can be "conventionalised" in the face of vested interests and near cartelised operations in space. The world community should be able to reason out for its own good and urge the few space operators to reach a consensus for the "common benefit of mankind". This would be an achievement and should be sincerely attempted at the III UN Conference on Exploration and Peaceful Uses of Outer Space scheduled for this year.

## VIII. CONCLUSION

Man was always mystified by space and was inquisitive to explore it. As he explored, he found this medium highly useful and tended to take greater advantage of the space in floating communication satellites, remote sensing and allied applications. The technological advances in space have today made it possible to travel into space or land on celestial bodies. The repeated success of these experiments has prodded the space powers to develop reusable vehicles to reduce costs of travel and open up a vista of space tourism as industry. The prospects appear promising and space tourism seems to be a new business frontier and possibly a flourishing industry of the twenty-first century. Private enterprise is certainly going to seize this commercially lucrative opportunity very soon.

The body of existing law comprising a few international agreements has primarily been intended for states and governmental agencies as players in the space arena. Further, the Space Treaty treats space as a common heritage of mankind. Other supporting and allied treaties reiterate the same concept and no private property rights are legally tenable in space or on the celestial bodies. This is an admirable doctrine of public international law but bodes ill for many profitable yet peaceful uses of space. Space tourism is one of them. Mining on the moon could be another, transmission of solar energy still another and so on.

Firstly, if space travel is to become popular, as market research has already shown enormous positive response, a legal regime of commercial space travel and for its concomitant incidents has to be put in place. The components of this regime could concern liability in accidents, support from insurance industry, liability for damage on surface of the earth, standardization of rules for travel documents, technical standards for safety, space worthiness of vehicles, traffic control in space and numerous other related aspects.

Secondly, if space hospitality is to develop in tandem with space travel, then it has to sprout as a commercially viable industry. Obviously for such a commercial purpose, no state will spare tax-payers' funds and the initiative must emanate from private enterprise. It is equally important to note that ventures in this field would involve colossal investments and corporations would be hesitant to commit funds unless they get certain guarantees of realty rights or modified ownership in this property, and are confident of sustained, equitable returns in the long term. Existing "conventional law" of space brooks no such concessions. Hence the need to bring about suitable change in our conviction and amend laws to provide scope for development rather than stifle hospitality in space and dry up a well spring of a new business frontier. It is well nigh imaginable that permissive provisions for private enteprise could be pregnant with risk of misuse commercially and even prone to political opportunism, yet remedial measures, whenever and wherever necessary, could be undertaken rather than smother a promising field of activity for fear of possible abuse.

The world community cannot remain content and complacent at the existing gamut of space law and its narrow focus on states as subjects and coverage of a constricted domain of state activities as its objects. This complexion shall have to be shed in the face of galloping technological advances in the arena of space environment. Of course, absolute or indiscriminate privatisation is not mooted, yet the onslaught of private enterprise in different fields of space activities cannot be withstood for long neither on legal prudery nor on good commerce sense. We cannot afford confined consciousness and it is only a matter of time whether now or a couple of decades later. It is recommended that we start devoting attention to this new field and gradually evolve appropriate regulations after diligent consideration of current constraints and cognition of futuristic visions.

The doctrine of common heritage of mankind has proved its wisdom in the law of seas, and the legal community has been zealously eager to extend its prudence to the space law. The sagacity of such an approach at the initial stages of space activities is beyond reproach and has well served its avowed purpose. It has tended to establish a few tenets of international relations which have thwarted opportunistic initiatives and arrested the possibility of fiercest competition in "occupation" and establishment of sovereignty over space entities. Mankind has been saved of this plunder. But it must be realised that that was the time of limited knowledge, and full potential of peaceful yet beneficial space activities was neither fully envisaged nor futuristic opportunities clearly visualised. Therefore, under the present information and knowledge of

unlimited peaceful uses of space, let us not be paranoid or dogmatic about this doctrine of common heritage of mankind and leave a vast expanse of fertile and profitable areas capable of improving human life fallow and arid knowingly and intentionally. This is outright injudicious if not economically suicidal. One strongly suggests that emphasis must suitably shift to the concept of "common benefit of mankind" for improvement in the quality of life and welfare of human beings on the planet earth.

The microcosm of space law is sluggish in its metabolism and has yet to "genetise" and grow suitable adjuncts. Cloning will also not help. Nor is the suggestion proffered for a monumental departure from traditional precepts or established customary law. The need is to evolve a new legal idiom and a judiciously liberal interpretation to harness new vistas for the development and uplift of mankind. The new legal paradigm should be able to accommodate the second generation of space law which perforce has to be perceptibly liberal, genuinely interactive, responsive to contingencies and conducive to opportunities that may open up as technology advances so that all living beings in the world can collectively gain and commonly benefit. An ideal progressive legal regime of space shall have proactive approach, assure unhindered growth, afford the desired economic fillip, ensure fullest accrual and provide equitable distribution of gains for the common benefit of mankind. This should be earnestly strived at the ensuing III UN Conference on the Exploration and Peaceful Uses of Outer Space with a positive, pragmatic and pre-emptive attitude.

# NOTES AND COMMENTS

# INDIA AND THE COMMONWEALTH

K SRINIVASAN*

On 27 April 1949 — and this year marks the 50th anniversar thereof — the Commonwealth ceased to be the "British Commonwealth and the United Kingdom, Canada, Australia, New Zealand, South Afric India, Pakistan and Sri Lanka (then Ceylon) declared themselves to b free and equal members of the Commonwealth of Nations. The Fina Communiqué of the Commonwealth Prime Miniters Meeting whic ended on 27 April 1949 specifically in two of its five operativ paragraphs referred to India's intention to become a sovereig independent republic, to continue its full membership of th Commonwealth and its acceptance of the then King George VI as th symbol of the free association of the member nations and as such th Head of the Commonwealth. This issue was in fact the sole subject o discussion at that meeting of the Prime Ministers. Many leaders of India' national movement had expected independent India to pull out of th Commonwealth. But Pandit Nehru said in 1948"— there is great scop for the Commonwealth — its very strength lies in its flexibility and it complete freedom."

Fifty years later, the Commonwealth is the biggest grouping o countries in the world with the same ideals and functioning in the sam language. It is the only inter-governmental group that has survived th second World War, having begun long ago in the 1920s. It has n constitution, no charter, no rules of procedure and no rules fo membership. And yet, or perhaps because of this feature, has survive over the years.

The Commonwealth Secretariat, set up in 1965 at Ghana' suggestion, served to diminish Britain's influence further. Up to tha time, Britain had been responsible for the organisation of meetings, role which was then taken over by the neutral Secretariat consisting o officials from across the wide racial spectrum of the Commonwealth.

Obviously, different countries see different kinds of benefit flowin from their membership of the Commonwealth. What is certain is tha since its numbers have grown from a handful to 54, the associatio retains a considerable allure. Of countries clearly eligible fo membership, only Ireland and Myanmar (Burma) have stayed out o the modern Commonwealth. Fiji, Pakistan and South Africa, who lef

* K. Srinivasan was Foreign Secretary in 1994-95 and is presently the Commonwealt Deputy Secretary-General.

the association in various ways and for various reasons, have all been glad to return. Over half of the 54 countries are regarded as "small states", that is, with a population of less than 1.5 million persons. These countries of low population see the Commonwealth as a useful and, indeed the sole, forum for promoting their own interests.

The Commonwealth is not an association which deals in bilateral disputes between Commonwealth countries and there are several of these — India and Pakistan, Namibia and Botswana, Nigeria and Cameroon, and so forth. This organisation is not a forum in which such disputes are internationalised, and there is no exercise of "mediation" or "good offices" at the Commonwealth initiative without the specific agreement of the parties concerned. There is no interference in the internal affairs of member countries. And the Memorandum which set up the Commonwealth Secretariat explicitly states "... the Commonwealth is not a formal organisation. It does not encroach on the sovereignty of individual members. Nor does it require its members to seek to reach collective decisions or to take united action". Except in cases where there are serious and persistent violations of the principles of democracy and human rights, the Commonwealth does not seek to pronounce on the internal affairs of any member country.

As far as India is concerned, the major communities of persons of Indian origin outside India are all in Commonwealth countries, with one exception, the USA. In 22 of the 54 member countries, India unfortunately has no resident diplomatic mission. This makes the Commonwealth an attractive alternative channel of contacts through which the Indian Government can reach out not only to persons of Indian origin abroad, but also to the governments of the countries where they have no resident representation. Due to the considerable network of governmental, non-governmental and professional organisations and meetings provided by the Commonwealth connection, ample scope exists for making rewarding contacts and promoting the Indian national interest in such forums. The Commonwealth is an ideal club in which national positions and national candidatures — including for the UN Security Council — can be promoted internationally. India as a founding member of the modern Commonwealth and with just under 60% of the population of the entire Commonwealth, is able to exercise a great leverage and exert influence over the Commonwealth's entire scope of work.

India is among the top half-dozen contributors not only to the budgets of the Secretariat, the Fund for Technical Co-operation, the Youth Programme, the Science Council, the Commonwealth Foundation and the Commonwealth of Learning, but is also one of a handful of countries contributing voluntarily to the Media Development Fund and to the

Commonwealth Small States Office at the Untied Nations in New York. India provides 16-20% of the consultants and experts reçruited to serve under the Commonwealth technical assistance programme (the second after Britain) and lies fourth in the number of persons trained by the Commonwealth, apart from being the first in providing facilities and venues for the Commonwealth training programmes. It is one of the few developing countries ever to host a Commonwealth Heads of Governmert Meeting and has been represented in 15 out of 26 Commonwealth groups observing democratic elections around the world.

The 4-yearly Commonwealth Games is one of the few international sports meetings where India is among the top ten medal winners. 25% of India's total trade is with other Commonwealth countries. About 7% of the total staff in the Secretariat is from India, after Britain and Sri Lanka. The number of Indian diplomatic officials has now unfortunately fallen to only three, a poor representation indeed for a country that has such a prominent share of the Commonwealth's total population. India has never held the post of Secretary-General and has only twice in the past 35 years had an officer at the second-in-command level, the Deputy Secretary-General. This is another reflection of the lack of adequate interest India has taken in securing its rightful share of the benefits from this organisation.

The Commonwealth is the only major political organisation in the world in which India automatically attracts a major leadership role despite rarely taking any lead or initiative, an attitude of almost benign neglect.

This indifference stems partly from a misconception that the Commonwealth is still Britain-centred and a hangover from the Empire — an opinion fostered perhaps by the Secretariat being based in London, because Britian is still willing to pay 30% of the Commonwealth budgets, and because Commonwealth matters are dealt with in the Ministry of External Affairs in Delhi, not by a multilateral division as they should be, but by the West Europe Division. This is indeed the basic cause of India's comparative neglect of the various assets it gains and can further gain from the Commonwealth. It is a singular irony considering that fifty years ago India created the modern Commonwealth, a durable legacy of the statesmanship and genius of Pandit Jawaharlal Nehru. The Commonwealth is still waiting for one of its leading and funding members to play a significant role; a role which, except for intermittent bursts of energy from Prime Ministers Indira Gandhi, Rajiv Gandhi and I.K. Gujral, India has so far declined to take up to the detriment of its own interests.

# JUDGMENTS AND AWARDS ON INTERNATIONAL LAW

## JUDGMENT OF THE INTERNATIONAL COURT OF JUSTICE

### INTERNATIONAL

**4 December 1998**

### Fisheries Jurisdiction Case*
### (Spain *v*. Canada)

### Jurisdiction of the Court

*Subject of the dispute—Role of the Application with regard to the determination of the questions on which the Court must adjudicate—Definition of the dispute by the Court—Specific acts taken by Canada on the basis of certain enactments and regulations, and consequences of those acts.*

*Jurisdiction of the Court—Question to be determined by the Court itself—No burden of proof.*

*Declarations of acceptance of the Court's compulsory jurisdiction—Conditions and reservations as elements serving to determine the scope of acceptance of the Court's jurisdiction and not as derogations from a wider acceptance already given—Interpretation of the various elements of a declaration as forming a single whole—Successive declarations—Regime applicable to the interpretation of declarations as unilateral acts, and that established for the interpretation of treaties—Interpretation of the relevant terms of a declaration, including reservations, in a natural and reasonable manner, due regard being had to the intention of the declarant State—Ascertaining the intention—Contra proferentem rule—Effectiveness principle—Legality of the acts covered by a reservation not relevant for purposes of interpretation of that reservation—Article 33 of the Charter.*

*Subparagraph 2 (d) of the Canadian declaration of 10 May 1994—Intention at the time of the subparagraph's adoption—Links between Canada's new declaration and its new coastal fisheries protection*

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* *Source* : Mimeographed Judgment of the ICJ.

*legislation—Parliamentary debates.*

*Interpretation of the text of the reservation:*

*"Disputes arising out of"—Broad and comprehensive character the phrase—Disputes having as their "subject-matter" the measur referred to in the reservation, "concerning" such measures or havin their "origin" therein.*

*"Conservation and management measures"—"Measure" as an ac step or proceeding—"Measure" of a "Legislative' nature—Relationshi between a statute and implementing regulations within the legislativ system of Canada and other countries—Interpretation of a international instrument in the light of international law—Distinctio between the definition of a concept and the legality of an act fallin within the scope of that concept—"Conservation and management measures as measures having as their purpose the conservation an management of living resources—Characterization by referenc t factual and scientific criteria—Conservation and management measure in the sense generally accepted in international law and practice.*

*"Taken by Canada with respect to vessels fishing in the NAF Regulatory Area, as defined in the Convention on Future Multilatera Co-operation in the Northwest Atlantic Fisheries, 1978"—Are constituting part of the high seas—Meaning to be attributed to the wor "vessels"—"Natural and reasonable" interpretation of the text— Declarant's intention—Parliamentary debates.*

*"And the enforcement of such measures"—Use of force—Pena sanctions and enforcement of conservation and management measure — Canadian legislation and regulations—Restrictions bringing th authorized use of force within the recognized category of measures o enforcement for purposes of conservation—Boarding, inspection an seizure of a fishing vessel, and minimal use of force for these purposes as elements coming within the concept of enforcement of conservatio and management measures according to a "natural and reasonable" interpretation of that concept.*

*Interpretation of the reservation not prejudging the legality of th acts covered hereby—No reason to apply Article 79, paragraph 7, o the Rules in order to declare that Canada's objection is not of a exclusively preliminary character.*

*"Automatic reservation"—Court not deprived of its competence t interpret Canada's reservation—Court's findings on its jurisdictio resulting from that interpretation alone.*

*Mootness—Determination not necessary in this case.*

## JUDGMENT

*Present :* *President* SCHWEBEL; *Vice-President* WEERAMANTRY; *Judges* ODA, BEDJAOUI, GUILLAUME, RANJEVA, HERCZEGH, SHI, FLEISCHHAUER, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIJMANS, REZEK; *Judges* ad hoc LALONDE, TORRES BERNARDEZ; *Registrar* VALENCIA-OSPINA.

In the fisheries jurisdiction case,

*between*

the Kingdom of Spain,

represented by

Mr. José Antonio Pastor Ridruejo, Head of the International Legal Service of the Ministry of Foreign Affairs, Professor of International Law at the Complutense University of Madrid,

as Agent and Counsel (until 31 October 1998);

Mr. Aurelio Pérez Giralda, Director of the International Legal Service of the Ministry of Foreign Affairs,

as Agent (from 1 November 1998);

Mr. Pierre-Marie Dupuy, Professor of International Law at the University Pantheon-Assas (Paris II),

Mr. Keith Highet, Member of the Bars of the District of Columbia and New York,

Mr. Antonio Remiro Brotóns, Professor of International Law at the Autonomous University of Madrid,

Mr. Luis Ignacio Sánchez Rodríguez, Professor of International Law at the Complutense University of Madrid,

as Counsel and Advocates;

Mr. Félix Valdés Valentín-Gamazo, Minister-Counsellor, Embassy of Spain to the Netherlands,

as Co-Agent;

Mr. Carlos Domínguez Díaz, Embassy Secretary, Assistant Director-General for International Fisheries Management Organizations, Ministry of Agriculture and Fisheries,

Mr. Juan José Sanz Aparicio, Embassy Secretary, Department of International Legal Affairs, Ministry of Foreign Affairs,

as Advisers,

*and*

Canada,

represented by

His Excellency Mr. Philippe Kirsch, Q.C., Ambassador and Lega Adviser to the Department of Foreign Affairs and Internationa Trade,

as Agent and Advocate;

Mr. Blair Hankey, Associate General Counsel, Department of Foreig Affairs and International Trade,

as Deputy Agent and Advocate;

Mr. L. Alan Willis, Q.C., Department of Justice,

as Senior Counsel and Advocate;

Mr. Prosper Weil, Professor emeritus, University of Paris,

as Counsel and Advocate;

Ms Louise de La Fayette, University of Southampton,

Mr. Paul Fauteux, Department of Foreign Affairs and Internationa Trade,

Mr. John F. G. Hannaford, Department of Foreign Affairs anc International Trade,

Ms Ruth Ozols Barr, Department of Justice,

Ms Isabelle Poupart, Department of Foreign Affairs and Internationa Trade,

Ms Laurie Wright, Department of Justice,

as Counsel;

Mr. Malcolm Rowe, Q.C., Government of Newfoundland anc Labrador,

Mr. Earl Wiseman, Department of Fisheries and Oceans,

as Advisers;

Ms Manon Lamirande, Department of Justice,

Ms Marilyn Langstaff, Department of Foreign Affairs anc International Trade,

Ms Annemarie Manuge, Department of Foreign Affairs anc International Trade,

Ms Robert McVicar, Department of Foreign Affairs and Internationa Trade,

Ms Lynn Pettit, Department of Foreign Affairs and International Trade,

as Administrative Officers,

THE COURT,

composed as above,

*delivers the following Judgment:*

1. On 28 March 1995, the Kingdom of Spain (hereinafter called "Spain") filed in the Registry of the Court an Application instituting proceedings against Canada in respect of a dispute relating to the amendment, on 12 May 1994, of the Canadian Coastal Fisheries Protection Act, and the subsequent amendments to the regulations implementing that Act, as well as to specific ac ons taken on the basis of the amended Act and its regulations, including the pursuit, boarding and seizure on the high seas, on 9 March 1995, of a fishing vessel—the *Estai*—flying the Spanish flag. The Application invoked as the basis of the jurisdiction of the Court the declarations whereby both States have accepted its compulsory jurisdiction in accordance with Article 36, paragraph 2, of its Statute.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was forthwith communicated to the Canadian Government by the Registrar; and, pursuant to paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. By letter of 21 April 1995, the Ambassador of Canada to the Netherlands informed the Court that, in his Government's opinion, the Court

> "manifestly lacks jurisdiction to deal with the Application filed by Spain .., by reason of paragraph 2 (*d*) of the Declaration, dated 10 May 1994, whereby Canada accepted the compulsory jurisdiction of the Court".

4. At a meeting between the President of the Court and the representatives of the Parties held on 27 April 1995, pursuant to Article 31 of the Rules of Court, the Agent of Canada confirmed his Government's position that the Court manifestly lacked jurisdiction in the case. At the close of the meeting it was agreed that the question of the jurisdiction of the Court should be separately determined before any proceedings on the merits; agreement was also reached on time-limits for the filing of written pleadings on that question.

By Order of 2 May 1995, the President, taking into account the agreement reached between the Parties, decided that the written proceedings should first be addressed to the question of the jurisdiction of the Court to entertain the dispute and fixed 29 September 1995 and 29 Feburary 1996, respectively, as the time-limits for the filing of a Memorial by Spain and a Counter-Memorial by Canada on that question.

The Memorial and the Counter-Memorial were duly filed within the time-limits so prescribed.

5. Since the Court included upon the Bench no judge of the nationality of the Parties, each of them availed itself of the right conferred by Article 31, paragraph 3, of the Statute to proceed to choose a judge *ad hoc* to sit in the case: Spain chose Mr. Santiago Torres Bernárdez, and Canada Mr. Marc Lalonde.

6. At a meeting held between the President of the Court and the Agents of the Parties on 17 April 1996, pursuant to Article 31 of the Rules of Court, the Agent of Spain expressed the wish of his Government to be authorized to submit a Reply and the Agent of Canada stated that his Government was opposed thereto. Each of the Parties subsequently confirmed its views on the matter in writing, Canada in letters from its Agent dated 22 April and 3 May 1996, and Spain in letters from its Agent dated 25 April and 7 May 1996.

By Order of 8 May 1996, the Court decided that it was sufficiently informed, at that stage, of the contentions of fact and law on which the Parties relied with respect to its jurisdiction in the case, and that the presentation, by them, of further written pleadings on that question therefore did not appear necessary. The case was consequently ready for hearing with regard to the question of the jurisdiction of the Court.

7. By letter of 8 June 1998, the Agent of Spain, referring to Article 56, paragraph 4, of the Rules of Court, submitted to the Court five official Canadian documents which had been published but not previously produced. A copy thereof was communicated to the Agent of Canada, who, by letter of 9 June 1998, stated that, in his Government's opinion, the provision referred to by Spain afforded the possibility of making reference in oral arguments to documents which were part of readily available publications, but did not contemplate their production, adding that despite the late date of submission of the documents in question Canada would not object to their production, in order to avoid delaying the work of the Court.

8. In accordance with Article 53, paragraph 2, of the Rules of Court, the Court, after ascertaining the views of the parties, decided that copies of the pleadings and documents annexed should be made accessible to

the public on the opening of the oral proceedings.

9. Public sittings were held between 9 and 17 June 1998, during which pleadings and replies were heard from the following:

| | |
|---|---|
| *For Spain*: | Mr. José Antonio Pastor Ridruejo,<br>Mr. Luis Ignacio Sanchez Rodriguez,<br>Mr. Antonio Remiro Brotóns,<br>Mr. Keith Highet,<br>Mr. Pierre-Marie Dupuy. |
| *For Canada*: | H.E. Mr. Philippe Kirsch,<br>Mr. Blair Hankey,<br>Mr. L. Alan Willis,<br>Mr. Prosper Weil. |

10. In the Application, the following requests were made by Spain:

"As for the precise nature of the complaint, the Kingdom of Spain requests:

(A) that the Court declare that the legislation of Canada, in so far as it claims to exercise a jurisdiction over ships flying a foreign flag on the high seas, outside the exclusive economic zone of Canada, is not opposable to the Kingdom of Spain;

(B) that the Court adjudge and declare that Canada is bound to refrain from any repetition of the acts complained of, and to offer to the Kingdom of Spain the reparation that is due, in the form of an indemnity the amount of which must cover all the damages and injuries occasioned; and

(C) that, consequently, the Court declare also that the boarding on the high seas, on 9 March 1995, of the ship *Estai* flying the flag of Spain and the measures of coercion and the exercise of jurisdiction over that ship and over its captain constitute a concrete violation of the aforementioned principles and norms of international law".

11. In the written pleadings, the following submissions were presented by the parties:

*On behalf of the Spanish Government,*

in the memorial:

"The Kingdom of Spain requests the Court to adjudge and declare that, regardless of any argument to the contrary, its Application is admissible and that the Court has, must exercise, jurisdiction in this case".

*On behalf of the Canadian Government,*

in the Counter-Memorial:

"*May it please the Court* to adjudge and declare that the Court has no jurisdiction to adjudicate upon the Application filed by Spain on 28 March 1995".

12. In the oral proceedings, the following submissions were presented by the Parties:

*On behalf of the Spanish Government,*

at the sitting of 15 June 1998:

"At the end of our oral arguments, we again note that Canada has abandoned its allegation that the dispute between itself and Spain has become moot. At least, it appears to have understood that it cannot be asserted that the Spanish Application, having no further purpose for the future, merely amounted to a request for a declaratory judgment. Nor does it say—a fact of which we take note—that the agreement between the European Union and Canada has extinguished the present dispute

Spain's final submissions are therefore as follows:

We noted at the outset that the subject-matter of the dispute is Canada's lack of title to act on the high seas against vessels flying the Spanish flag, the fact that Canadian fisheries legislation cannot be invoked against Spain, and reparation for the wrongful acts perpetrated against Spanish vessels. These matters are not included in Canada's reservation to the jurisdiction of the Court.

We also noted that Canada cannot claim to subordinate the Application of its reservation to the sole criterion of its national legislation and its own appraisal without disregarding your competence under Article 36, paragraph 6, of the Statute, to determine your own jurisdiction.

Lastly, we noted that the use of force in arresting the *Estai* and in harassing other Spanish vessels on the high seas, as well as the use of

force contemplated in Canadian Bills C-29 and C-8, can also not be included in the Canadian reservation, because it contravenes the provisions of the Charter.

For all the above reasons, we ask the Court to adjudge and declare that it has jurisdiction in this case."

*On behalf of the Canadian Government,*

at the sitting of 17 June 1998:

> "*May it please the Court* to adjudge and declare that the Court has no jurisdiction to adjudicate upon the Application filed by Spain on 28 March 1995".

13. The Court will begin with an account of the background to the case.

14. On 10 May 1994 Canada deposited with the Secretary-General of the United Nations a declaration of acceptance of the compulsory jurisdiction of the Court which was worded as follows:

> "On behalf of the Government of Canada,
>
> (1) I give notice that I hereby terminate the acceptance by Canada of the compulsory jurisdiction of the International Court of Justice hitherto effective by virtue of the declaration made on 10 September 1985 in conformity with paragraph 2 of Article 36 of the Statute of the Court.
>
> (2) I declare that the Government of Canada accepts as compulsory *ipso facto* and without special convention, on condition of reciprocity, the jurisdiction of the International Court of Justice, in conformity with paragraph 2 of Article 36 of the Statute of the Court, until such time as notice may be given to terminate the acceptance, over all disputes arising after the present declaration with regard to situations or facts subsequent to this declaration, other than:
>
> (*a*) disputes in regard to which the parties have agreed or shall agree to have recourse to some other method of peaceful settlement;
>
> (*b*) disputes with the Government of any other country which is a member of the Commonwealth, all of which disputes shall be settled in such manner as the parties have agreed or shall agree;

(*c*) disputes with regard to questions which by international law fa exclusively within the jurisdiction of Canada; and

(*d*) disputes arising out of or concerning conservation an management measures taken by Canada with respect to vessel fishing in the NAFO Regulatory Area, as defined in th Convention on Future Multilateral Co-operation in the Northwes Atlantic Fisheries, 1978, and the enforcement of such measures

(3) The Government of Canada also reserves the right at any time by means of a notification addressed to the Secretary-General of the United Nations, and with effect as from the moment of such notification either to add to, amend or withdraw any of the foregoing reservations or any that may hereafter be added.

It is requested that this notification be communicated to the Governments of all the States that have accepted the Optional Clause and to the Registrar of the International Court of Justice".

The three reservations set forth in subparagraphs (*a*), (*b*) and (*c*) of paragraph 2 of the above-mentioned declaration had already been included in Canada's prior declaration of 10 September 1985. Subparagraph (*d*) of the 1994 declaration, however, set out a new, fourth reservation, further excluding from the jurisdiction of the Court

"(d) disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area, as defined in the Convention on Future Multilateral Co-operation in the Northwest Atlantic Fisheries, 1978, and the enforcement of such measures".

15. On the same day that the Canadian Government deposited its new declaration, it submitted to Parliament Bill C-29 amending the Coastal Fisheries Protection Act by extending its area of application to include the Regulatory Area of the Northwest Atlantic Fisheries Organization (NAFO). Bill C-29 was adopted by Parliament, and received the Royal Assent on 12 May 1994.

Section 2 of the Coastal Fisheries Protection Act as amended defined the "NAFO Regulatory Area" as "that part of the Convention Area of the Northwest Atlantic Fisheries Organization that is on the high seas.."

The new Section 5.1 of the Act contained the following declaration:

"5.1 Parliament, recognizing

(*a*) that straddling stocks on the Grand Banks of Newfoundland are a major renewable world food source having provided a livelihood for centuries to fishers,

(*b*) that those stocks are threatened with extinction,

(*c*) that there is an urgent need for all fishing vessels to comply in both Canadian fisheries waters and the NAFO Regulatory Area with sound conservation and management measures for those stocks, notably those measures that are taken under the *Convention on Future Multilateral Co-operation in the Northwest Atlantic Fisheries,* done at Ottawa on 24 October 1978, Canada Treaty Series 1979 No. 11, and

(*d*) that some foreign fishing vessels continue to fish for those stocks in the NAFO Regulatory Area in a manner that undermines the effectiveness of sound conservation and management measures,

declares that the purpose of section 5.2. is to enable Canada to take urgent action necessary to prevent further destruction of those stocks and to permit their rebuilding, while continuing to seek effective international solutions to the situation referred to in paragraph (*d*)".

The new Section 5.2 read as follows:

"5.2 No person, being aboard a foreign fishing vessel of a prescribed class, shall, in the NAFO Regulatory Area, fish or prepare to fish for a starddling stock in contravention of any of the prescribed conservation and management measures".

Sections 7 ("Boarding by protection officer"), 7.1 ("Search") and 8.1 ("Use of force") of the Act as amended dealt with the activities of Canadian fisheries protection officers within the NAFO Regulatory Area. These sections read as follows:

"7. A protection officer may

(*a*) for the purpose of ensuring compliance with this Act and the regulations, board and inspect any fishing vessel found within Canadian fisheries waters or the NAFO Regulatory Area; and

(*b*) with a warrant issued under section 7.1, search any fishing vessel found within Canadian fisheries waters or the NAFO Regulatory Area and its cargo.

"7.1. (1) A justice of the peace who on *ex parte* application is satisfied by information on oath that there are reasonable grounds to believe that there is in any place, including any premises, vessel or vehicle, any fish or other thing that was obtained by or used in, or that will afford evidence in respect of, a contravention of this Act or the regulations, may issue a warrant authorizing the protection officer named in the warrant to enter and search the place for the fish or other

thing subject to any conditions that may be specified in the warrant.

(2) A protection officer may exercise the powers referred to i paragraph 7 (*b*) without a warrant if the conditions for obtaining warrant exist but, by reason of exigent circumstances, it would not b practical to obtain a warrant."

"8.1. A protection officer may, in the manner and to the exten prescribed by the regulations, use force that is intended or is likely t disable a foreign fishing vessel, if the protection officer

(*a*) is proceeding lawfully to arrest the master or other person i command of the vessel; and

(*b*) believes on reasonable grounds that the force is necessary fo the purpose of arresting that master or other person."

Finally, the new Section 18.1, which was concerned with the application of criminal law, stated:

"An act or omission that would be an offence under an Act of Parliament if it occurred in Canada is deemed to have been committed in Canada if it occurs, in the course of enforcing this Act,

(*a*) in the NAFO Regulatory Area on board or by means of a foreign fishing vessel on board or by means of which a contravention of section 5.2 has been committed; or

(*b*) in the course of continuing pursuit that commenced while a foreign fishing vessel was in Canadian fisheries waters or the NAFO Regulatory Area."

16. On 12 May 1994, following the adoption of Bill C-8, Canada also amended Section 25 of its Criminal Code relating to the use of force by police officers and other peace officers enforcing the law. The Section applied as well to fisheries protection officers, since their duties incidentally included those of peace officers.

17. On 25 May 1994 the Coastal Fisheries Protection Regulations were also amended.

The new Sections 19.3 to 19.5 regulated "the use of force" by Canadian fisheries protection officers pursuant to Section 8.1 of the amended Act.

The new subsection 2 of Section 21 of the Regulations provided as follows:

"(2) For the purposes of section 5.2 of the Act,

(*a*) starddling stocks are,

(*i*) in Division 3L, Division 3N and Division 3O, the stocks of fish set out in Table I to this section, and

(*ii*) in Division 3M, the stocks of fish set out in Table II to this section;

(*b*) vessels without nationality and foreign fishing vessels that fly the flag of any state set out in Table III to this section are prescribed classes of vessels; and

(*c*) a prohibition against fishing for straddling stocks, preparing to fish for straddling stocks or catching and retaining straddling stocks is a prescribed conservation and management measure".

The "straddling stocks" referred to in "Table I" included the "Greenland halibut" (also called in French *"flétan noir"*). This was the only stock mentioned in "Table II". "Table III" specified Belize, the Cayman Islands, Honduras, Panama, Saint Vincent and the Grenadines and Sierra Leone.

18. These Regulations were further amended on 3 March 1995.

In their amended version, paragraphs (*b*) to (*d*) of Section 21 (2) read as follows:

"(*b*) the following classes of foreign fishing vessels are prescribed classes namely

(i) foreign fishing vessels without nationality,

(ii) foreign fishing vessels that fly the flag of any state set out in Table III to this section, and

(iii) foreign fishing vessels that fly the flag of any state set out in Table IV to this section;

(c) in respect of a foreign fishing vessel of a class prescribed by subparagraph (b) (*i*) or (*ii*), prohibitions against fishing for the straddling stocks set out in Table I or II to this section, preparing to fish for those straddling stocks and catching and retaining those straddling stocks are prescribed conservation and management measures; and

(*d*) in respect of a foreign fishing vessel of a class prescribed by subparagraph (*b*) (*iii*), the measures set out in Table V to this section are prescribed conservation and management measures".

"Table IV" referred to Spain and Portugal. "Table V", which was headed "Prescribed Conservation and Management Measures", began by laying down the following prohibitions:

"1. Prohibitions against fishing for, or catching and retaining, Greenland halibut in Division 3L, Division 3M, Division 3N or Division 3O during the period commencing on March 3 and terminating on December 31 in any year."

19. On 9 March 1995, the *Estai*, a fishing vessel flying the Spanis flag and manned by a Spanish crew, was intercepted and boarded som 245 miles from the Canadiancoastin Division 3L of the NAFO Regulator Area (Grand Banks area), by Canadian Government vessels. The vesse was seized and its master arrested on charges of violations of the Costa Fisheries Protection Act and its implementing regulations. They wer brought to the Canadian port of St. Hohns, Newfoundland, where the were charged with offences under the above legislation, and in particula illegal fishing for Greenland halibut; part of the ship's catch wa confiscated. The members of the crew were released immediately. The master was released on 12 March 1995, following the payment of bail and the vessel on 15 March 1995, following the posting of a bond.

20. The same day the *Estai* was boarded, the Spanish Embassy in Canada sent two Notes Verbales to the Canadian Department of Foreign Affairs and International Trade. The second of these stated *inter alia* that: "the Spanish Government categorically condemn[ed] the pursuit and harassment of a Spanish vessel by vessel of the Canadian navy, in flagrant violation of the international law in force, since these acts [took] place outside the 200-mile zone". On 10 March 1995, the Spanish Ministry of Foreign Affairs sent a Note Verbale to the Canadian Embassy in Spain which contained the following passage:

> "In carrying out the said boarding operation, the Canadian authorities breached the inversely accepted norm of customary international law codified in Article 92 and articles to the same effect of the 1982 Convention on the Law of the Sea, according to which ships on the high seas shall be subject to the exclusive jurisdiction of the flag State....
>
> The Spanish Government considers that the wrongful act committed by ships of the Canadian navy can in no way be justified by presumed concern to conserve fisheries in the area, since it violates the established provisions of the NAFO Convention to which Canada is a party".

In its turn, on 10 March 1995 the Canadian Department of Foreign Affairs and International Trade sent a Note Verbale to the Spanish Embassy in Canada, in which it was stated that "[t]he *Estai* resisted the efforts to board her made by Canadian inspectors in accordance with international practice" and that "the arrest of the *Estai* was necessary in order to put a stop to the overfishing of Greenland halibut by Spanish fishermen".

Also on 10 March 1995, the European Community and its member States sent a Note Verbale to the Canadian Department of Foreign Affairs and International Trade which included the following:

> "The arrest of a vessel in international waters by a State other than the State of which the vessel is flying the flag and under whose jurisdiction it falls, is an illegal act under both the NAFO Convention and customary international law, and cannot be justified by any means. With this action Canada is not only flagrantly violating international law, but is failing to observe normal behaviour of responsible States.
>
> This act is particularly unacceptable since it undermines all the efforts of the international community, notably in the framework of the FAO and the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, to achieve effective conservation through enhanced cooperation in the management of fisheries resources.
>
> This serious breach of international law goes far beyond the question of fisheries conservation. The arrest is a lawless act against the sovereignty of a Member State of the European Community. Furthermore, the behaviour of the Canadian vessels has clearly endangered the lives of the crew and the safety of the Spanish vessel concerned.
>
> The European Community and its Member States demand that Canada immediately release the vessel, repair any damages caused, cease and desist from its harassment of vessels flying the flag of Community Member States and immediately repeal the legislation under which it claims to take such unilateral action".

21. On 16 April 1995, an "Agreement constituted in the form of an Agreed Minute, an Exchange of Letters, an Exchange of Notes and the Annexes thereto between the European Community and Canada on fisheries in the context of the NAFO Convention" was initialled; this Agreement was signed in Brussels on 20 April 1995.

In Part A ("Control and Enforcement") of the Agreed Minute, the Community and Canada agreed on proposals which would "constitute the basis for a submission to be jointly prepared and made to the NAFO Fisheries Commission, for its consideration and approval, to establish a Protocol to strengthen the NAFO Conservation and Enforcement Measures"; at the same time the parties decided to implement immediately, on a provisional basis, certain control and enforcement

Part B ("Total Allowable Catch and Catch Limits"), they agreed on the total allowable catch for 1995 for Greenland halibut within the area concerned, and to certain management arrangements for stocks of this fish. In Part C ("Other Related Issues") Canada undertook to

> "repeal the provisions of the Regulation of 3 March 1995 pursuant to the Coastal Fisheries Protection Act which subjected vessels from Spain and Portugal to certain provisions of the Act and prohibited these vessels from fishing for Greenland halibut in the NAFO Regulatory Area";

It was further stated that, for the European Community, "any re-insertion by Canada of vessels from any European Community member State into legislation which subjects vessels on the high seas to Canadian jurisdiction" would be considered as a breach of the Agreed Minute. It was likewise stated in that Part that Canada would regard as a breach of the Agreed Minute

> "any systematic and sustained failure of the European Community to control its fishing vessels in the NAFO Regulatory Area which clearly has resulted in violations of a serious nature of NAFO conservation and enforcement measures".

Point 1 of Part D ("General Provisions") of the Agreed Minutes provided as follows:

> "The European Community and Canada maintain their respective positions on the conformity of the amendment of 25 May 1994 to Canada's Coastal Fisheries Protection Act, and subsequent regulations, with customary international law and the NAFO Convention. Nothing in this Agreed Minute shall prejudice any multilateral convention to which the European Community and Canada, or any Member State of the European Community and Canada, are parties, or their ability to preserve and defend their rights in conformity with international law, and the views of either Party with respect to any question relating to the Law of the Sea".

Finally, Part E ("Implementation") stated that the "Agreed Minute [would] cease to apply on 31 December 1995 or when the measures described in this Agreed Minute [were] adopted by NAFO, if this [should be] earlier".

The Exchange of Letters noted the agreement of the parties on two points. It was agreed, on the one hand, that the posting of a bond for the release of the vessel *Estai* and the payment of bail for the release of

its master

> "[could] not be interpreted as meaning that the European Community or its Member States recognize[d] the legality of the arrest or the jurisdiction of Canada beyond the Canadian 200-mile zone against fishing vessels flying the flag of another State"

and, on the other hand, that

> "the Attorney-General of Canada [would] consider the public interest in his decision on staying the prosecution against the vessel *Estai* and its master; in such case, the bond, bail and catch or its proceeds [would] be returned to the master".

The European Community emphasized that the stay of prosecution was essential for the application of the Agreed Minute.

22. On 18 April 1995 the proceedings against the *Estai* and its master were discontinued by order of the Attorney-General of Canada; on 19 April 1995 the bond was discharged and the bail was repaid with interest; and subsequently the confiscated portion of the catch was returned. On 1 May 1995 the Coastal Fisheries Protection Regulations were amended so as to remove Spain and Portugal from Table IV to Section 21. Finally, the Proposal for Improving Fisheries Control and Enforcement, contained in the Agreement of 20 April 1995, was adopted by NAFO at its annual meeting held in September 1995 and became measures binding on all Contracting Parties with effect from 29 November 1995.

23. Neither of the Parties denies that there exists a dispute between them. Each Party, however, characterizes the dispute differently. Spain has characterized the dispute as one relating to Canada's lack of entitlement to exercise jurisdiction on the high seas, and the non-opposability of its amended Coastal Fisheries Protection legislation and regulations to third States, including Spain. Spain further maintains that Canada, by its conduct, has violated Spain's rights under international law and that such violation entitles it to reparation. Canada states that the dispute concerns the adoption of measures for the conservation and management of fisheries stocks with respect to vessels fishing in the NAFO Regulatory Area and their enforcement.

24. Spain contends that the purpose of its Application is not to seise the Court of a dispute concerning fishing on the high seas or the management and conservation of biological resources in the NAFO Regulatory Area. Claiming that its exclusive jurisdiction over ships flying its flag on the high seas has been disregarded and swept aside, it

argues that

> "the object of the Spanish Application relates essentially to Canada's entitlement in general, and in particular in relation to Spain, to exercise its jurisdiction on the high seas against ships flying the Spanish flag and their crews, and to enforce that right by a resort to armed force".

25. Spain maintains that the Agreement of 20 April 1995 between the European Community and Canada on fisheries in the context of the NAFO Convention (see paragraph 21 above) settled as between Canada and the Community certain aspects of a dispute provoked by the unilateral actions of Canada within the area of the high seas subject to regulation by NAFO (an organization of which both the Community and Canada are members). Spain also stresses that it co-operated in the conclusion of this Agreement as a member State of the Community, to which, it states, competence in respect of fisheries conservation and management has been transferred. However, according to Spain, its Application is based on a right exclusive to itself and concerns a dispute whose subject-matter differs from that covered by the Agreement; this dispute, therefore, is not merely a matter of fisheries conservation and management.

26. For its part, Canada is of the view that:

> "this case arose out of and concerns conservation and management measures taken by Canada with respect to Spanish vessels fishing in the NAFO Regulatory Area and the enforcement of such measures".

Canada contended at the hearing that Spain's Application constitutes

> "a claim in State responsibility on account of Canada's alleged violation of the international obligations incumbent upon it under the rules and principles of general international law",

and maintained that a dispute consists of an indivisible whole comprising facts and rules of law. In its view the Court cannot have jurisdiction with regard to one of these elements and not have jurisdiction with regard to the other.

27. Canada, referring to the notes of protest addressed to it by the European Community and by Spain (see paragraph 20 above), points out that they contain no trace of any distinction between a dispute with the European Community and a dispute with Spain, and that both the protests of the Community and those by the Spanish authorities "are

founded on the dual, inextricably linked grounds of the fisheries protection legislation and general principles of international law". Canada argues that this conclusion is confirmed by the Agreement of 20 April 1995 between the European Community and Canada, inasmuch as "here, too, those questions relating to fisheries and those relating to State jurisdiction, legal entitlement and respect for the rights of the flag State are closely interlinked".

28. Spain insists that it is free, as the Applicant in this case, to characterize the dispute that it wishes the Court to resolve.

29. There is no doubt that it is for the Applicant, in its Application, to present to the Court the dispute with which it wishes to seise the Court and to set out the claims which it is submitting to it.

Paragraph 1 of Article 40 of the Statute of the Court requires moreover that the "subject of the dispute" be indicated in the Application; and, for its part, paragraph 2 of Article 38 of the Rules of Court requires "the precise nature of the claim" to be specified in the Application. In a number of instances in the past the Court has had occasion to refer to these provisions. It has characterized them as 'essential from the point of view of legal security and the good administration of justice" and, on this basis, has held inadmissible new claims, formulated during the course of proceedings, which, if they had been entertained, would have transformed the subject of the dispute originally brought before it under the terms of the Application (*Certain Phosphate Lands in Nauru* (*Nauru* v. *Australia*), *Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 266-267; see also *Prince von Pless Administration, Order of 4 February 1933, P.C.I.J., Series A/B, No. 52*, p. 14 and *Société Commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B*, No. 78, p. 173).

In order to identify its task in any proceedings instituted by one State against another, the Court must begin by examining the Application (see *Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959*, p. 21; *Right of Passage over Indian Territory, Merits, Judgment, I.C.J. Reports 1960*, p. 27; *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 260, para. 24). However, it may happen that uncertainties or disagreements arise with regard to the real subject of the dispute with which the Court has been seised, or to the exact nature of the claims submitted to it. In such cases the Court cannot be restricted to a consideration of the terms of the Application alone nor, more generally, can it regard itself as bound by the claims of the Applicant.

Even in proceedings instituted by Special Agreement, the Court has

determined for itself, having examined all of the relevant instruments, what was the subject of the dispute brought before it, in circumstances where the parties could not agree on how it should be characterized (see *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, pp. 14-15, para. 19 and p. 28, para. 57).

30. It is for the Court itself, while giving particular attention to the formulation of the dispute chosen by the Applicant, to determine on an objective basis the dispute dividing the parties, by examining the position of both Parties:

> "[I]t is the Court's duty to isolate the real issue in the case and to identify the object of the claim. It has never been contested that the Court is entitled to interpret the submissions of the parties, and in fact is bound to do so; this is one of the attributes of its judicial functions" (*Nuclear Tests* (*New Zealand* v. *France*), *Judgment, I.C.J. Reports 1974*, p. 466, para. 30; see also *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests* (New Zealand *v*. France) *Case*, *Order of 22 September 1995, I.C.J. Reports* 1995, p. 304, para. 55.)

The Court's jurisprudence shows that the Court will not confine itself to the formulation by the Applicant when determining the subject of the dispute. Thus, in the case concerning the *Right of Passage over Indian Territory*, the Court, in order to form a view as to its jurisdiction, defined the subject of the dispute in the following terms:

> "A passage in the Application headed 'Subject of the Dispute' indicates that subject as being the conflict of views which arose between the two States when, in 1954, India opposed the exercise of Portugal's right of passage. If this were the subject of the dispute referred to the Court, the challenge to the jurisdiction could not be sustained. But it appeared from the Application itself and it was fully confirmed by the subsequent proceedings, the Submissions of the Parties and statements made in the course of the hearings, that the dispute submitted to the Court has a threefold subject:
>
> (1) The disputed existence of a right of passage in favour of Portugal;
>
> (2) The alleged failure of India in July 1954 to comply with its obligations concerning that right of passage;

> (3) The redress of the illegal situation flowing from that failure." (*Right of Passage over Indian Territory, Merits, Judgment, I.C.J. Reports 1960*, pp. 33-34.)

31. The Court will itself determine the real dispute that has been submitted to it (see *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, pp. 24-25). It will base itself not only on the Application and final submissions, but on diplomatic exchanges, public statements and other pertinent evidence (see *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, pp. 262-263).

32. In so doing, the Court will distinguish between the dispute itself and arguments used by the parties to sustain their respective submissions on the dispute:

> "The Court has ...repeatedly exercised the power to exclude, when necessary, certain contentions or arguments which were advanced by a party as part of the submissions, but which were regarded by the Court, not as indications of what the party was asking the Court to decide, but as reasons advanced why the Court should decide in the sense contended for by that party." (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 262, para. 29; see also cases concerning *Fisheries, Judgment, I.C.J. Reports 1951*, p. 126; *Minquiers and Ecrehos, Judgment, I.C.J. Reports 1953*, p. 52; *Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955*, p. 16.)

33. In order to decide on the preliminary issue of jurisdiction which arises in the present case, the Court will ascertain the dispute between Spain and Canada, taking account of Spain's Application, as well as the various written and oral pleadings placed before the Court by the Parties.

34. The filing of the Application was occasioned by specific acts of Canada which Spain contends violated its rights under international law. These acts were carried out on the basis of certain enactments and regulations adopted by Canada, which Spain regards as contrary to international law and not opposable to it. It is in that context that the legislative enactments and regulations of Canada should be considered.

35. The specific acts (see paragraph 34 above) which gave rise to the present dispute are the Canadian activities on the high seas in relation to the pursuit of the *Estai*, the means used to accomplish its arrest and the fact of its arrest, and the detention of the vessel and arrest of its master, arising from Canada's amended Coastal Fisheries Protection

Act and implementing regulations. The essence of the dispute betwee the Parties is whether these acts violated Spain's rights unde international law and require reparation. The Court must now decid whether the Parties have conferred upon it jurisdiction in respect of tha dispute.

36. As Spain sees it, Canada has in principle accepted the jurisdiction of the Court through its declaration under Article 36, paragraph 2, of the Statute, and it is for Canada to show that the reservation contained in paragraph 2 (*d*) thereto does exempt the dispute between the Parties from this jurisdiction. Canada, for its part, asserts that Spain must bear the burden of showing why the clear words of paragraph 2 (*d*) do not withhold this matter from the jurisdiction of the Court.

37. The Court points out that the establishment or otherwise of jurisdiction is not a matter for the parties but for the Court itself. Although a party seeking to assert a fact must bear the burden of proving it (see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America*), *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p.437, para. 101), this has no relevance for the establishment of the Court's jurisdiction, which is a "question of law to be resolved in the light of the relevant facts" (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 76, para. 16).

38. That being so, there is no burden of proof to be discharged in the matter of jurisdiction. Rather, it is for the Court to determine from all the facts and taking into account all the arguments advanced by the Parties, "whether the force of the arguments militating in favour of jurisdiction is preponderant, and to 'ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it" (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras*), *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 76, para. 18; see also *Factory at Chorzow, Jurisdiction, Judgment No. 8, 1927, P.C.I.J. Series A, No. 9*, p. 32).

39. As the basis of jurisdiction, Spain founded its claim solely on the declarations made by the Parties pursuant to Article 36, paragraph 2, of the Statute. On 21 April 1995 Canada informed the Court, by letter, that in its view the Court lacked jurisdiction to entertain the Application because the dispute was within the plain terms of the reservation in paragraph 2 (*d*) of the Canadian declaration of 10 May 1994. This position was elaborated in its Counter-Memorial of February 1996, and confirmed at the hearings.

40. Spain appears at times to contend that Canada's reservation is invalid or inoperative by reason of incompatibility with the Court's Statute, the Charter of the United Nations and with international law. However, Spain's position mainly appears to be that these claimed incompatibilities require an interpretation to be given to paragraph 2 (d) of the declaration different from that advanced by Canada. In its Memorial at paragraph 39 Spain thus stated:

> "Although the Court has hitherto avoided making a concrete determination on the compatibility or incompatibility, with the Statute, of the literal content of certain reservations, and on which certain judges have commented, initiating a major doctrinal debate, the reservation in paragraph 2 (*d*) of the Canadian Declaration does not raise any problems of this kind.
>
> There may be reservations which, owing to their wording, are incompatible with the Statute, but the Canadian Declaration is not one of them. On the other hand, what may be incompatible with the Statute is a certain interpretation of that reservation which Canada now appears to claim to present as the sole authentic interpretation of its reservation with a view to evading the jurisdiction of the Court.
>
> There are—or there may be—not just *anti-statutory* reservations; there are also *anti-statutory interpretations* of certain reservations".

While in the oral argument reference was made by Spain to "invalidity" and "nullity", and to the reservation being without effect and applying to "nothing", here again the emphasis was on the need for an interpretation of the reservation that would be compatible with international law.

41. Accordingly, the Court concludes that Spain contends that the interpretation of paragraph 2 (d) of its declaration sought for by Canada would not only be an anti-statutory interpretation, but also an anti-Charter interpretation and an anti-general international law interpretation, and thus should not be accepted. The issue for the Court is consequently to determine whether the meaning to be accorded to the Canadian reservation allows the Court to declare that it has jurisdiction to adjudicate upon the dispute brought before it by Spain's Application.

42. Spain and Canada have both recognized that States enjoy a wide liberty in formulating, limiting, modifying and terminating their declarations of acceptance of the compulsory jurisdiction of the Court

under Article 36, paragraph 2, of the Statute. They equally both agree that a reservation is an integral part of a declaration accepting jurisdiction.

43. However, different views were proffered as to the rules of international law applicable to the interpretation of reservations to optional declarations made under Article 36, paragraph 2, of the Statute. In Spain's view, such reservations were not to be interpreted so as to allow reserving States to undermine the system of compulsory jurisdiction. Moreover, the principle of effectiveness meant that a reservation must be interpreted by reference to the object and purpose of the declaration, which was the acceptance of the compulsory jurisdiction of the Court. Spain did not accept that it was making the argument that reservations to the compulsory jurisdiction of the Court should be interpreted restrictively; it explained its position in this respect in the following terms:

> "It is said that Spain argues for the most restrictive scope permitted of reservations, namely a restrictive interpretation of them ... This is not true. Spain supports the most limited scope permitted in the context of observing of the general rule of interpretation laid down in Article 31 of the Vienna Convention on the Law of Treaties."

Spain further contended that the *contra proferentem* rule, under which, when a text is ambiguous, it must be construed against the party who drafted it, applied in particular to unilateral instruments such as declarations of acceptance of the compulsory jurisdiction of the Court and the reservations which they contained. Finally, Spain emphasized that a reservation to the acceptance of the Court's jurisdiction must be interpreted so as to be in conformity with, rather than contrary to, the Statute of the Court, the Charter of the United Nations and general international law.

For its part, Canada emphasized the unilateral nature of such declarations and reservations and contended that the latter were to be interpreted in a natural way, in context and with particular regard for the intention of the reserving State.

44. The Court recalls that the interpretation of declarations made under Article 36, paragraph 2, of the Statute, and of any reservations they contain, is directed to establishing whether mutual consent has been given to the jurisdiction of the Court.

It is for each State, in formulating its declaration, to decide upon the limits it places upon its acceptance of the jurisdiction of the Court: "This jurisdiction only exists within the limits within which it has been accepted" (*Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series*

*A/B, No. 74*, p. 23). Conditions or reservations thus do not by their terms derogate from a wider acceptance already given. Rather, they operate to define the parameters of the State's acceptance of the compulsory jurisdiction of the Court. There is thus no reason to interpret them restrictively. All elements in a declaration under Article 36, paragraph 2, of the Statute which, read together, comprise the acceptance by the declarant State of the Court's jurisdiction, are to be interpreted as a unity, applying the same legal principles of interpretation throughout.

45. This is true even when, as in the present case, the relevant expression of a State's consent to the Court's jurisdiction, and the limits to that consent, represent a modification of an earlier expression of consent, given within wider limits. An additional reservation contained in a new declaration of acceptance of the Court's jurisdiction, replacing an earlier declaration, is not to be interpreted as a derogation from a more comprehensive acceptance given in that earlier declaration; thus, there is no reason to interpret such a reservation restrictively. Accordingly, it is the declaration in existence that alone constitutes the unity to be interpreted, with the same rules of interpretation applicable to all its provisions, including those containing reservations.

46. A declaration of acceptance of the compulsory jurisdiction of the Court, whether there are specified limits set to that acceptance or not, is a unilateral act of State sovereignty. At the same time, it establishes a consensual bond and the potential for a jurisdictional link with the other States which have made declarations pursuant to Article 36, paragraph 2, of the Statute, and "makes a standing offer to the other States party to the Statute which have not yet deposited a declaration of acceptance" (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, I.C.J. Reports 1998*, para. 25). The regime relating to the interpretation of declarations made under Article 36 of the Statute is not identical with that established for the interpretation of treaties by the Vienna Convention on the Law of Treaties (*ibid.*, para. 30). Spain has suggested in its pleadings that "[t]his does not mean that the legal rules and the art of interpreting declarations (and reservations) do not coincide with those governing the interpretation of treaties". The Court observes that the provisions of that Convention may only apply analogously to the extent compatible with the *sui generis* character of the unilateral, acceptance of the Court's jurisdiction.

47. In the event, the Court has in earlier cases elaborated the appropriate rules for the interpretation of declarations and reservations

Every declaration "must be interpreted as it stands, having regard the words actually used" (*Anglo-Iranian Oil Co., Preliminary Objectio Judgment, I.C.J. Reports 1952*, p. 105). Every reservation must be giv effect "as it stands" (*Certain Norwegian Loans, Judgment, I.C.J. Repor 1957*, p. 27). Therefore, declarations and reservations are to be read a whole. Moreover, "the Court cannot base itself on a purely grammatic interpretation of the text. It must seek the interpretation which is harmony with a natural and reasonable way of reading the text." (*Anglo Iranian Oil Co., Preliminary Objection, Judgment, I.C.J. Reports 195* p. 104.)

48. At the same time, since a declaration under Article 36, paragrap 2, of the Statute, is a unilaterally drafted instrument, the Court has no hesitated to place a certain emphasis on the intention of the depositin State. Indeed, in the case concerning *Anglo-Iranian Oil Co.*, the Cour found that the limiting words chosen in Iran's declaration were "a decisive confirmation of the intention of the Government of Iran at the time when it accepted the compulsory jurisdiction of the Court" (*ibid.*, p. 107).

49. The Court will thus interpret the relevant words of a declaration including a reservation contained therein in a natural and reasonable way, having due regard to the intention of the State concerned at the time when it accepted the compulsory jurisdiction of the Court. The intention of a reserving State may be deduced not only from the text of the relevant clause, but also from the context in which the clause is to be read, and an examination of evidence regarding the circumstances of its preparation and the purposes intended to be served. In the *Aegean Sea Continental Shelf* case, the Court affirmed that it followed clearly from its jurisprudence that in interpreting the contested reservation

> "regard must be paid to the intention of the Greek Government at the time when it deposited its instrument of accession to the General Act; and it was with that jurisprudence in mind that the Court asked the Greek Government to furnish it with any available evidence of explanations of the instrument of accession given at that time" (*Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 29, para. 69). In the present case the Court has such explanations in the form of Canadian ministerial statements, parliamentary debates, legislative proposals and press communiqués.

50. Where, moreover, an existing declaration has been replaced by a new declaration which contains a reservation, as in this case, the intentions of the Government may also be ascertained by comparing the terms of the two instruments.

51. The *contra proferentem* rule may have a role to play in the interpretation of contractual provisions. However, it follows from the foregoing analysis that the rule has no role to play in this case in interpreting the reservation contained in the unilateral declaration made by Canada under Article 36, paragraph 2, of the Statute.

52. The Court was addressed by both Parties on the principle of effectiveness. Certainly, this principle has an important role in the law of treaties and in the jurisprudence of this Court; however, what is required in the first place for a reservation to a declaration made under Article 36, paragraph 2, of the Statute, is that it should be interpreted in a manner compatible with the effect sought by the reserving State.

53. Spain has contended that, in case of doubt, reservations contained in declarations are to be interpreted consistently with legality and that any interpretation which is inconsistent with the Statute of the Court, the Charter of the United Nations or with general international law is inadmissible. Spain draws attention to the following finding of the Court in the *Right of Passage over Indian Territory* case, where the Court had to rule on the compatibility of a reservation with the Statute:

> "It is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it". (*Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 142.)

Spain argues that, to comply with these precepts, it is necessary to interpret the phrase "disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area... and the enforcement of such measures" to refer only to measures which, since they relate to areas of the high seas, must come within the framework of an existing international agreement or be directed at stateless vessels. It further argues that an enforcement of such measures which involves a recourse to force on the high seas against vessels flying flags of other States could not be consistent with international law and that this factor too requires an interpretation of the reservation different from that given to it by Canada.

54. Spain's position is not in conformity with the principle of interpretation whereby a reservation to a declaration of acceptance of the compulsory jurisdiction of the Court is to be interpreted in a natural and reasonable way, with appropriate regard for the intentions of the reserving State and the purpose of the reservation. In point of fact,

reservations from the Court's jurisdiction may be made by States for variety of reasons; sometimes precisely because they feel vulnerab about the legality of their position or policy. Nowhere in the Court' case-law has it been suggested that interpretation in accordance wit the legality under international law of the matters exempted from th jurisdiction of the Court is a rule that governs the interpretation of suc reservations:

> "Declarations of acceptance of the compulsory jurisdiction of the Court are facultative, unilateral engagements, that States are absolutely free to make or not to make. In making the declaration a State is equally free either to do so unconditionally and without limit of time for its duration, or to qualify it with conditions or reservations." (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 418, para. 59.)

The holding of the Court relied on by Spain in the *Right of Passage over Indian Territory* case, which was concerned with a possible retroactive effect of a reservation, does not detract from this principle. The fact that a State may lack confidence as to the compatibility of certain of its actions with international law does not operate as an exception to the principle of consent to the jurisdiction of the Court and the freedom to enter reservations.

55. There is a fundamental distinction between the acceptance by a State of the Court's jurisdiction and the compatibility of particular acts with international law. The former requires consent. The latter question can only be reached when the Court deals with the merits, after having established its jurisdiction and having heard full legal argument by both parties.

56. Whether or not States accept the jurisdiction of the Court, they remain in all cases responsible for acts attributable to them that violate the rights of other States. Any resultant disputes are required to be resolved by peaceful means, the choice of which, pursuant to Article 33 of the Charter, is left to the parties.

57. In order to determine whether the Parties have accorded to the Court's jurisdiction over the dispute brought before it, the Court must now interpret subparagraph (*d*) of paragraph 2 of Canada's declaration, having regard to the rules of interpretation which it has jut set out.

58. However, before commencing its examination of the text of the reservation itself, the Court feels bound to make two observations which

it considers essential in order to ascertain the intention which underlay the adoption of that text. The first of these concerns the importance attaching to the reservation in the light of the acceptance by Canada of the Court's jurisdiction; the second concerns the relationship between that reservation and the Canadian coastal fisheries protection legislation.

59. The Court has already pointed out (see paragraph 14 above) that the current Canadian declaration replaced a previous one, dated 10 September 1985. The new declaration differs from its predecessor in one respect only: the addition, to paragraph 2, of a subparagraph (d) containing the reservation in question. It follows that this reservation is not only an integral part of the current declaration but also an essential component of it, and hence of the acceptance by Canada of the Court's compulsory jurisdiction.

60. As regards the objectives which the reservation was intended to achieve, the Court is bound to note, in view of the facts as summarized above (paragraphs 14 *et seq.*), the close links between Canada's new declaration and its new coastal fisheries protection legislation. The new declaration was deposited with the Secretary-General on 10 May 1994, that is to say the very same day that Bill C-29 was submitted to the Canadian Parliament; moreover, the terms in which Canada accepted the compulsory jurisdiction of the Court on that day echo those of the Bill then under discussion. Furthermore, it is evident from the parliamentary debates and the various statements of the Canadian authorities that the purpose of the new declaration was to prevent the Court from exercising its jurisdiction over matters which might arise with regard to the international legality of the amended legislation and its implementation. Thus on 10 May 1994 Canada issued a News Release on "Foreign overfishing", explaining its policy in this field and adding that:

> "Canada has today amended its acceptance of the compulsory jurisdiction of the International Court of Justice in the Hague to preclude any challenge which might undermine Canada's ability to protect the stocks. This is a temporary step in response to an emergency situation."

Further, on 12 May 1994, the Canadian Minister for Foreign Affairs made the following statement in the Senate:

> "As you know, to protect the integrity of this legislation, we registered a reservation to the International Court of Justice, explaining that this reservation would of course be temporary..."

61. The Court recalls that subparagraph 2 (*d*) of the Canadian declaration excludes the Court's jurisdiction in the following terms:

> "disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area, as defined in the Convention on Future Multilateral Co-operation in the Northwest Atlantic Fisheries, 1978, and the enforcement of such measures" (see paragraph 14 above).

Canada contends that the dispute submitted to the Court is precisely of the kind envisaged by the cited text; it falls entirely within the terms of the subparagraph and the Court accordingly has no jurisdiction to entertain it.

For Spain, on the other hand, whatever Canada's intentions, they were not achieved by the words of the reservation, which does not cover the dispute; thus the Court has jurisdiction. In support of this view Spain relies on four main arguments: first, the dispute which it has brought before the Court falls outside the terms of the Canadian reservation by reason of its subject-matter; secondly, the amended Coastal Fisheries Protection Act and its implementing regulations cannot, in international law, constitute "conservation and management measures"; thirdly, the reservation covers only "vessels" which are stateless or flying a flag of convenience; and fourthly, the pursuit, boarding and seizure of the *Estai* cannot be regarded in international law as "the enforcement of..." conservation and management "measures". The Court will examine each of these arguments in turn.

62. The Court will begin by pointing out that, in excluding from its jurisdiction *"disputes arising out of or concerning"* the conservation and management measures in question and their enforcement, the reservation does not reduce the criterion for exclusion to the "subject-matter" of the dispute. The language used in the English version—*"disputes arising out of or concerning"*—brings out more clearly the broad and comprehensive character of the formula employed. The words of the reservation exclude not only disputes whose immediate "subject-matter" is the measures in question and their enforcement, but also those "*concerning*" such measures and, more generally, those having their "origin" in those measures *("arising out of")*—that is to say, those disputes which, in the absence of such measures, would not have come into being. Thus the scope of the Canadian reservation appears even broader than that of the reservation which Greece attached to its accession to the General Act of 1928 ("disputes relating to the territorial status of Greece"), which the Court was called upon to interpret in the

case concerning the *Aegean Sea Continental Shelf (I.C.J. Reports 1978*, p. 34, para. 81 and p. 36, para. 86).

63. The Court has already found, in the present case, that a dispute does exist between the Parties, and it has identified that disptue (see paragraph 35 above). It must now determine whether that dispute has as its subject-matter the measures mentioned in the reservation or their enforcement, or both, or concerns those measures, or arises out of them. In order to do this, the fundamental question which the Court must now decide is the meaning to be given to the expression *"conservation and management measures..."* and *"enforcement of such measures"* in the context of the reservation.

64. Spain recognizes that the term *"measure"* is "an abstract word signifying an act or provision, a démarche or the course of an action, conceived with a precise aim in view" and that in consequence, in its most general sense, the expression *"conservation and management measures" must be understood as referring to an act, step or proceeding designed for the purpose of the "conservation and management of fish"*.

However, in Spain's view this expression, in the particular context of the Canadian reservation, must be interpreted more restrictively.

Initially, Spain contended that the reservation did not apply to the Canadian legislation, which merely represented "the legal title which [was] the origin and basis of the prohibition of fishing on the high seas", or "frame of reference". The reservation covered only "the consequences of that Act for the conservation and management of resources", that is to say "the actual procedures for enforcement or implementation of the Act". However, in oral argument, it no longer pursued this point.

Spain's main argument, on which it relied throughout the proceedings, is that the term "conservation and management measures" must be interpreted here in accordance with international law and that in consequence it must, in particular, exclude any unilateral "measure" by a State which adversely affected the rights of other States outside that State's own area of jurisdiction. Hence, in international law only two types of measures taken by a costal State could, in practice, be regarded as "conservation and management measures": those relating to the State's exclusive economic zone; and those relating to areas outside that zone, in so far as these came within the framework of an international agreement or were directed at stateless vessels. Measures not satisfying these conditions were not conservation and management measures but unlawful acts pure and simple. In the course of this argument, Spain referred to Article 1 (1) (*b*) of the "Agreement for the Implementation of the Provisions of the United Nations Convention on

the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks" (hereinafter referred to as the "United Nations Agreement on Straddling Stocks of 1995"), which reads as follows

"1. For the purposes of this Agreement:

(*b*) 'Conservation and management measures' means measures to conserve and manage one or more species of living marine resources that are adopted and applied consistent with the relevant rules of international law as reflected in the Convention and this Agreement".

65. Canada, by contrast, stresses the very wide meaning of the word "measure". It takes the view that this is a "generic term", which is used in international conventions to encompass statutes, regulations and administrative action.

Canada further argues that the expression "conservation and management measures" is "descriptive" and not "normative"; it covers "the whole range of measures taken by States with respect to the living resources of the sea". Canada further states that "a generic category is never limited to the known examples it contains". Finally, Canada contends that the United Nations Agreement on Straddling Stocks of 1995 is not relevant for the purpose of determining the general meaning of the expression in question and its possible scope in other legal instruments.

66. The Court need not linger over the question whether a "measure" may be of a "legislative" nature. As the Parties have themselves agreed, in its ordinary sense the word is wide enough to cover any act, step or proceeding, and imposes no particular limit on their material content or on the aim pursued thereby. Numerous international conventions include "laws" among the "measures" to which they refer (see for example, as regards "conservation and management measures", Articles 61 and 62 of the 1982 United Nations Convention on the Law of the Sea). There is no reason to suppose that any different treatment should be applied to the Canadian reservation, the text of which itself refers not to measures adopted by the executive but simply to "Canada", that is to say the State as a whole, of which the legislature is one constituent part. Moreover, as the Court has already pointed out (see paragraph 60), the purpose of the reservation was specifically to protect "the integrity" of the Canadian coastal fisheries protection legislation. Thus to take the contrary view would be to disregard the evident intention of the declarant and to deprive the reservation of its effectiveness.

67. The Court would further point out that, in the Canadian legislative system as in that of many other countries, a statute and its implementing regulations cannot be dissociated. The statute establishes the general legal framework and the regulations permit the application of the statute to meet the variable and changing circumstances through a period of time. The regulations implementing the statute can have no legal existence independently of that statute, while conversely the statute may require implemnting regulations to give it effect.

68. The Court shares with Spain the view that an international instrument must be interpreted by reference to international law. However, in arguing that the expression "conservation and management measures" as used in the Canadian reservation can apply only to measures "in conformity with international law", Spain would appear to mix two issues. It is one thing to seek to determine whether a concept is known to a system of law, in this case international law, whether it falls within the categories proper to that system and whether, within that system, a particular meaning attaches to it: the question of the existence and content of the concept within the system is a matter of definition. It is quite another matter to seek to determine whether a specific act falling within the scope of a concept known to a system of law violates the normative rules of that system: the question of the conformity of the act with the system is a question of legality.

69. At this stage of the proceedings, the task of the Court is simply to determine whether it has jurisdiction to entertain the dispute. To this end it must interpret the terms of the Canadian reservation, and in particular the meaning attaching in the light of international law to the expression "conservation and management measures" as used in that reservation.

70. According to international law, in order for a measure to be characterized as a "conservation and management measure", it is sufficient that its purpose is to conserve and manage living resources and that, to this end, it satisfies various technical requirements.

It is in this sense that the terms "conservation and management measures" have long been understood by States in the treaties which they conclude. Notably, this is the sense in which "conservation and management measures" is used in paragraph 4 of Article 62 of the 1982 United Nations Convention on the Law of the Sea (see also 1923 Convention between the United States of America and Canada for the Preservation of the Halibut Fisheries of the Northern Pacific Ocean, especially Articles 1 and 2; 1930 Convention between the United States of America and Canada for the Preservation of the Halibut Fisheries of

the Northern Pacific Ocean and Bering Sea, Arts. 1, 2 and 3; 1949 International Convention for the Northwest Atlantic Fisheries, Art. IV (2) and especially Art. VIII; 1959 North-East Atlantic Fisheries Convention, Art. 7; 1973 Convention on Fishing and Conservation of the Living Resources in the Baltic Sea and the Belts, Art. I and especially Art. X. Cf. 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas, Art. 2). The same usage is to be found in the practice of States. Typically, in their enactments and administrative acts, States describe such measures by reference to such critieria as: the limitation of catches through quotas; the regulation of catches by prescribing periods and zones in which fishing is permitted; and the setting of limits on the size of fish which may be caught or the types of fishing gear which may be used (see, among very many examples, Algerian Legislative Decree No. 94-13 of 28 May 1994, establishing the general rules relating to fisheries; Argentine Law No. 24922 of 6 January 1998, establishing the Federal Fishing Regime; Malagasy Ordinance No. 93-022 of 1993 regulating fishing and aquaculture; New Zealand Fisheries Act 1996; as well as, for the European Union, the basic texts formed by Regulation (EEC) NO. 3760/92 of 20 December 1992, establishing a Community system for fisheries and aquaculture, and Regulation (EC) No. 894/97 of 29 April 1997, laying down certain technical measures for the conservation of fisheries resources. For NAFO practice, see its document entitled Conservation and Enforcement Measures (NAFO/FC/Doc. 96/1). International law thus characterizes "conservation and management measures" by reference to factual and scientific criteria.

In certain international agreements (for example, the United Nations Agreement on Straddling Stocks of 1995 and the "Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas" (FAO 1993), neither of which has entered into force) the parties have expressly stipulated, "for purposes of th[e] Agreement", that what is generally understood by "conservation and management measures" must comply with the obligations of international law that they have undertaken pursuant to these agreements, such as, compatibility with maximum sustainable yield, concern for the needs of developing States, the duty to exchange scientific data, effective flag State control of its vessels, and the maintenance of detailed records of fishing vessels.

The question of who may take conservation and management measures, and the areas to which they may relate, is neither in international law generally nor in these agreements treated as an element of the definition of conservation and management measures. The

authority from which such measures derive, the area affected by them, and the way in which they are to be enforced do not belong to the essential attributes intrinsic to the very concept of conservation and management measures; they are, in contrast, elements to be taken into consideration for the purpose of determining the legality of such measures under international law.

71. Reading the words of the reservation in a "natural and reasonable" manner, there is nothing which permits the Court to conclude that Canada intended to use the expression "conservation and management measures" in a sense different from that generally accepted in international law and practice. Moreover, any other interpretation of that expression would deprive the reservation of its intended effect.

72. The Court has already given a brief description of the amendments made by Canada on 12 May 1994 to the Coastal Fisheries Protection Act and on 25 May 1994 and 3 March 1995 to the Coastal Fisheries Protection Regulations (see paragraphs 15, 17 and 18).

It is clear on reading Section 5.2 of the amended Act that its sole purpose is to prohibit certain sorts of fishing, while Sections 7, 7.1 and 8.1 prescribe the means for giving effect to that prohibition. The same applies to the corresponding provisions of the amended Regulations. In its version of 25 May 1994, subsection 2 of Section 21 of the Regulations, which implements Section 5.2 of the Act, defines the protected straddling stocks and "the prescribed classes" of vessels, and states that for such vessels "a prohibition against fishing for straddling stocks, preparing to fish for straddling stocks or catching and retaining straddling stocks is a prescribed conservation and management measure". Table V to Section 21 of the Regulations as amended on 3 March 1995 lists seven types of "conservation and management measures" applicable to ships flying the Spanish or Portuguese flag; the first two of these specify the species of fish in respect of which fishing is prohibited in certain areas and during certain periods; the next two specify the types of fishing gear which are prohibited; the fifth lays down size limits; while the last two lay down certain rules with which ships must comply in connection with inspection by protection officers.

73. The Court concludes from the foregoing that the "measures" taken by Canada in amending its coastal fisheries protection legislation and regulations constitute "conservation and management measures" in the sense in which that expression is commonly understood in international law and practice and has been used in the Canadian reservation.

74. The conservation and management measures to which this reservation refers are measures *"taken by Canada with respect to vessels fishing in the NAFO Regulatory Area, as defined in the Convention on Future Multilateral Co-operation in the Northwest Atlantic Fisheries, 1978"*.

Article 1, paragraph 2, of that Convention defines the NAFO "Regulatory Area" as "that part of the Convention Area which lies beyond the areas in which coastal States exercise fisheries jurisdiction"; paragraph 1 of this same Article states that the "Convention Area" is "the area to which this Convention applies" and defines that area by reference to geographical co-ordinates.

The NAFO "Regulatory Area" is therefore indisputably part of the high seas. The Court need not return to the doubts which this part of the reservation may have raised on the Spanish side, in view of the construction placed by the latter on the expression "conservation and management measures". For its part the Court has determined that this expression must be construed in a general and customary sense, without any special connotations with regard to place.

75. Thus the only remaining issue posed by this part of the reservation is the meaning to be attributed to the word "vessels". Spain argues that it is clear from the parliamentary debates which preceded the adoption of Bill C-29 that the latter was intended to apply only to stateless vessels or to vessels flying a flag of convenience. It followed, according to Spain—in view of the close links between the Act and the reservation—that the latter also covered only measures taken against such vessels.

Canada accepts that, when Bill C-29 was being debated, there were a number of references to stateless vessels and to vessels flying flags of convenience, for at the time such vessels posed the most immediate threat to the conservation of the stocks that it sought to protect. However, Canada denies that its intention was to restrict the scope of the Act and the reservation to these categories of vessels.

76. The Court will begin by once again pointing out that declarations of acceptance of its jurisdiction must be interpreted in a manner which is in harmony with the "natural and reasonable" way of reading the text, having due regard to the intention of the declarant. The Canadian reservation refers to "vessels fishing ...", that is to say all vessels fishing in the area in question, without exception. It would clearly have been simple enough for Canada, if this had been its real intention, to qualify the word "vessels" so as to restrict its meaning in the context of the reservation. In the opinion of the Court the interpretation proposed by

Spain cannot be accepted, for it runs contrary to a clear text, which, moreover, appears to express the intention of its author.

77. Furthermore, the Court cannot share the conclusions drawn by Spain from the parliamentary debates cited by it. It is, indeed, evident from the replies given by the Canadian Ministers of Fisheries and Oceans and for Foreign Affairs to the questions put to them in the House of Commons and in the Senate that at that time the principal target of the Bill was stateless vessels and those flying flags of convenience; however, these were not the only vessels covered. Thus the Minister of Fisheries and Oceans expressed himself as follows before the House of Commons:

> "as to what is meant by 'vessels of a prescribed class', it is simply a reference that allows the government to prescribe or designate a class, a type or kind of vessel we have determined is fishing in a manner inconsistent with conservation rules and therefore against which conservation measures could be taken.
>
> *For example*, we could prescribe stateless vessels. Another example is that we could prescribe flags of convenience. That is all that is meant." (Emphasis added.)

Similarly, the Minister for Foreign Affairs stated in the Senate:

> "We have said from the outset, and Canada's representatives abroad in our various embassies have explained to our European partners and other parties, that this measure is directed first of all toward vessels that are unflagged or that operate under so-called flags of convenience." (Emphasis added.)

Furthermore, the following statement by the Minister of Fisheries and Oceans to the Speaker of the House of Commons leaves no doubt as to the scope of the proposed Act:

> "The legislation gives Parliament of Canada the authority to designate any class of vessel for enforcement of conservation measures. The legislation does not categorize whom we would enforce aganist. The legislation makes clear that any vessel fishing in a manner inconsistent with good, widely acknowledged conservation rules could be subject to action by Canada. We cite as an example the NAFO conservation rules. Any vessel from any nation fishing at variance with good conservation rules could under the authority granted in the legislation be subject to action by Canada. There are no exceptions".

This is confirmed by the inclusion in the "prescribed classes of foreign fishing vessels", as a result of the amendment of 3 March 1995, of vessels flying the Spanish and Portuguese flags (see paragraph 18 above). Indeed, it should not be forgotten that, through the enactment of the legislation by means of regulations as well as statute, from the outset the potential was deliberately left open to add prescribed classes of vessels, the term "class" referring not only to types of vessels but also to the flags the vessels were flying.

78. The Court must now examine the phrase *"and the enforcement of such measures"*, on the meaning and scope of which the Parties disagree. Spain contends that an exercise of jurisdiction by Canada over a Spanish vessel on the high seas entailing the use of force falls outside of Canada's reservation to the Court's jurisdiction. Spain advances several related arguments in support of this thesis. First, Spain says that the use of force by one State against a fishing vessel of another State on the high seas is necessarily contrary to international law; and as Canada's reservation must be interpreted consistently with legality, it may not be interpreted to subsume such use of force within the phrase "the enforcement of such measures". Spain further asserts that the particular use of force directed against the *Estai* was in any event unlawful and amounted to a violation of Article 2, paragraph 4, of the Charter, giving rise to a separate cause of action not caught by the reservation.

79. The Court has already indicated that there is no rule of interpretation which requires that reservations be interpreted so as to cover only acts compatible with international law. As explained above, this is to confuse the legality of the acts with consent to jurisdiction (see paragraphs 55 and 56 above). Thus the Court has no need to consider further these aspects of Spain's arguments.

80. By Section 18.1 of the 1994 Act, the enforcement of its provisions in the NAFO Regulatory Area was made subject to the application of criminal law. In turn, Section 25 of the Criminal Code was amended following the adoption of Bill C-8 (see paragraph 16 above). Spain contends in this context that Canada has thus provided for penal measures related to the criminal law and not enforcement of conservation and management measures. Spain also contends that the expression "enforcement of such measures" in paragraph 2 (*d*) of Canada's declaration contained no mention of the use of force and that the expression should not be interpreted to include it—not least because the relevant provisions of the 1982 United Nations Law of the Sea Convention relating to enforcement measures also make no mention of the use of force.

81. The Court notes that, following the adoption of Bill C-29, the Coastal Fisheries Protection Act authorized protection officers to board and inspect any fishing vessel in the NAFO Regulatory Area and "in the manner and to the extent prescribed by the regulations, use force that is intended or is likely to disable a foreign fishing vessel", if the officer "believes on reasonable grounds that the force is necessary for the purpose of arresting" the master or crew (Section 8.1). Such provisions are of a character and type to be found in legislation of various nations dealing with fisheries conservation and management, as well as in Article 22 (1) (*f*) of the United Nations Agreement on Straddling Stocks of 1995.

82. The Coastal Fisheries Protection Regulations Amendment of May 1994 specifies in further detail that force may be used by a protection officer under Section 8.1 of the Act only when he is satisfied that boarding cannot be achieved by "less violent means reasonable in the circumstances" and if one or more warning shots have been fired at a safe distance (Sections 19.4 and 19.5). These limitations also bring the authorized use of force within the category familiar in connection with enforcement of conservation measures.

83. As to Spain's contention that Section 18.1 of the 1994 Act and the amendment of Section 25 of the Criminal Code constitute measures of penal law other than enforcement of fisheries conservation measures, and thus fall outside of the reservation, the Court notes that the purpose of these enactments appears to have been to control and limit any authorized use of force, thus bringing it within the general category of measures in enforcement of fisheries conservation.

84. For all of these reasons the Court finds that the use of force authorized by the Canadian legislation and regulations falls within the ambit of what is commonly understood as enforcement of conservation and management measures and thus falls under the provisions of paragraph 2 (*d*) of Canada's declaration. This is so notwithstanding that the reservation does not in terms mention the use of force. Boarding, inspection, arrest and minimum use of force for those purposes are all contained within the concept of enforcement of conservation and management measures according to a "natural and reasonable" interpretation of this concept.

85. In this Judgment, the Court has had to interpret the words of the Canadian reservation in order to determine whether or not the acts of Canada, of which Spain complains, fall within the terms of that reservation, and hence whether or not it has jurisdiction. For this purpose the Court has not had to scrutinize or prejudge the legality of the acts referred to in paragraph 2 (*d*) of the Canada's declaration.

Because the lawfulness of the acts which the reservation to th Canadian declaration seeks to exclude from the jurisdiction of the Cou has no relevance for the interpretation of the terms of that reservatio the Court has no reason to apply Article 79, paragraph 7, of its Rules i order to declare that Canada's objection to the jurisdiction of the Cou does not possess, in the circumstances of the case, an exclusivel preliminary character.

86. In the course of the proceedings Spain argued that the reservatio contained in paragraph 2 (*d*) of Canada's declaration might be though to have the characteristics of an "automatic reservation" and thus be in breach of Article 36, paragraph 6, of the Statute. It is clear from the Court's interpretation of the reservation as set out above that it cannot be regarded as having been drafted in terms such that its application would depend upon the will of its author. The Court has had full freedom to interpret the text of the reservation, and its reply to the question whether or not it has jurisdiction to entertain the dispute submitted to it depends solely on that interpretation.

87. In the Court's view, the dispute between the Parties, as it has been identified in paragraph 35 of this Judgment, had its origin in the amendments made by Canada to its coastal fisheries protection legislation and regulations and in the pursuit, boarding and seizure of the *Estai* which resulted therefrom. Equally, the Court has no doubt that the said dispute is very largely concerned with these facts. Having regard to the legal characterization placed by the Court upon those facts, it concludes that the dispute submitted to it by Spain constitutes a dispute "arising out of" and "concerning" "conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area" and "the enforcement of such measures". It follows that this dispute comes within the terms of the reservation contained in paragraph 2 (*d*) of the Canadian declaration of 10 May 1994. The Court consequently has no jurisdiction to adjudicate upon the present dispute.

88. Finally, the Court notes that, in its Counter-Memorial of February 1996, Canada maintained that any dispute with Spain had been settled, since the filing of the Application, by the agreement concluded on 20 April 1995 between the European Community and Canada, and that the Spanish submissions were now without object. However, at the beginning of Canada's oral argument, its Agent informed the Court that his Government intended to challenge the Court's jurisdiction solely on the basis of its reservation: "It is on this problem, and no other, that the Court is called upon to rule". This position was confirmed at the end of the oral proceedings. Spain nonetheless draws attention to the "Court's statutory duty to verify the existence of a dispute between

States in order to exercise its function".

It is true that it is for the Court to satisfy itself, whether at the instance of a party or *proprio motu*, that a dispute has not become devoid of purpose since the filing of the Application and that there remains reason to adjudicate that dispute (see *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 38; *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p.271, para. 58). The Court has, however, reached the conclusion in the present case that it has no jurisdiction to adjudicate the dispute submitted to it by Spain (see paragraph 87 above). That being so, in the view of the Court it is not required to determine *proprio motu* whether or not that dispute is distinct from the dispute which was the subject of the Agreement of 20 April 1995 between the European Community and Canada, and whether or not the Court would have to find it moot.

89. For these reasons,

THE COURT,

By twelve votes to five,

*Finds* that it has no jurisdiction to adjudicate upon the dispute brought before it by the Application filed by the Kingdom of Spain on 28 March 1995.

IN FAVOUR: *President* Schwebel; *Judges* Oda, Guillaume, Herczegh, Shi, Fleischhauer, Koroma, Higgins, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc Lalonde;

AGAINST: *Vice-President* Weeramantry; *Judges* Bedjaoui, Ranjeva, Vereshchetin; *Judge* ad hoc Torres Bernárdez.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this fourth day of December, one thousand nine hundred and ninety-eight, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Kingdom of Spain and the Government of Canada.

(*Signed*) Stephen M. Schwebel,
President.

(*Signed*) Eduardo Valencia-Ospina,
Registrar.

President SCHWEBEL and Judges ODA, KOROMA and KOOIJMANS append separate opinions to the Judgment of the Court.*

Vice-President WEERAMANTRY, Judges BEDJAOUI, RANJEVA and VERESHCHETIN, and Judge *ad hoc* TORRES BERNÁRDEZ append dissenting opinions to the Judgment of the Court.*

(*Initialled*) S.M.S.

(*Initialled*) E.V.O.

* These have been omitted in this reproduction.

## INTERNATIONAL COURT OF JUSTICE

### 3 MARCH 1999

### Case Concerning the Vienna Convention on Consular Relations

### (Germany *v.* United States of America)

### Request for the Indication of Provisional Measures

*Vienna Convention on Consular Relations, 1963—Article 36(1)(b)—A foreign national's right to consular assistance—Non-applicability of the municipal law doctrine of "procedural fault"—Imputability of conduct of competent organs and authorities, to the state within whose jurisdiction the conduct was committed—Obligation of a constituent state of a federal State to conduct itself in conformity with the international undertakings of the latter.*

*Jurisdiction of the International Court—Article 36(1) of the Statute and Article 1 of the Optional Protocol to the Vienna Convention on Consular Relations, 1963—Indication of provisional measures under Article 41 of the Statute read with Articles 73-75 of the Rules of Court—Finding of prima facie existence of the Court's jurisdiction.*

*The role of the ICJ—Not as a Court of Criminal Appeal, but to adjudicate international disputes relating to the interpretation and application of a treaty.*

ORDER

*Present* : *Vice-President* WEERAMANTRY, *Acting President; President* SCHWEBEL; *Judges* ODA, GUILLAUME, RANJEVA, HERCZEGH, SHI, FLEISCHHAUER, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIJMANS, REZEK; *Registrar* VALENCIA-OSPINA.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court and to Articles 73, 74 and 75 of the Rules of Court,

Having regard to the Application filed in the Registry of the Court at 7.30 p.m. (The Hague time) on 2 March 1999, whereby the Federal Republic of Germany (hereinafter "Germany") instituted proceedings against the United States of America (hereinafter "the United States") for "violations of the Vienna Convention on Consular Relations [of 24 April 1963]" (hereinafter the "Vienna Convention") allegedly committed by the United States,

*Makes the following Order:*

1. Whereas, in its aforementioned Application, Germany bases the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes, which accompanies the Vienna Convention on Consular Relations ("the Optional Protocol");

2. Whereas, in the Application, it is stated that in 1982 the authorities of the State of Arizona detained two German nationals, Karl and Walter LaGrand; whereas it is maintained that these individuals were tried and sentenced to death without having been informed, as is required under Article 36, subparagraph 1 (*b*), of the Vienna Convention, of their rights under that provision; whereas it is specified that that provision requires the competent authorities of a State party to advise, "without delay", a national of another State party whom such authorities arrest or detain of the national's right to consular assistance guaranteed by Article 36; whereas it is also alleged that the failure to provide the required notification precluded Germany from protecting its nationals' interests in the United States under Articles 5 and 36 of the Vienna Convention at both the trial and the appeal level in the United States courts;

3. Whereas, in the Application, Germany states that it had been, until very recently, the contention of the authorities of the State of Arizona that they had been unaware of the fact that Karl and Walter LaGrand were nationals of Germany; whereas it had accepted that contention as true; however, during the proceedings before the Arizona Mercy Committee on 23 February 1999, the State Attorney admitted that the authorities of the State of Arizona had indeed been aware since 1982 that the two detainees were German nationals;

4. Whereas, in the same Application, Germany further states that Karl and Walter LaGrand, finally with the assistance of German consular officers, did claim violations of the Vienna Convention before the Federal Court of First Instance; whereas that court, applying the municipal law doctrine of "procedural default", decided that, because the individuals in question had not asserted their rights under the Vienna

Convention in the previous legal proceedings at State level, they could not assert them in the Federal *habeas corpus* proceedings; and whereas the intermediate federal appellate court, last means of legal recourse in the United States available to them as of right, affirmed this decision;

5. Whereas, the Federal Republic of Germany asks the Court to adjudge and declare:

"(1) that the United States, in arresting, detaining, trying, convicting and sentencing Karl and Walter LaGrand, as described in the preceding statement of facts, violated its international legal obligations to Germany, in its own right and in its right of diplomatic protection of its nationals, as provided by Articles 5 and 36 of the Vienna Convention,

(2) that Germany is therefore entitled to reparation,

(3) that the United States is under an international legal obligation not to apply the doctrine of 'procedural default' or any other doctrine of national law, so as to preclude the exercise of the rights accorded under Article 36 of the Vienna Convention; and

(4) that the United States is under an international obligation to carry out in conformity with the foregoing international legal obligations any future detention of or criminal proceedings against any other German national in its territory, whether by a constituent, legislative, executive, judicial or other power, whether that power holds a superior or subordinate position in the organization of the United States, and whether that power's functions are of an international or internal character;

and that, pursuant to the foregoing international legal obligations,

(1) the criminal liability imposed on Karl and Walter LaGrand in violation of international legal obligations is void, and should be recognized as void by the legal authorities of the United States;

(2) the United States should provide reparation, in the form of compensation and satisfaction, for the execution of Karl LaGrand on 24 February, 1999;

(3) the United States should restore the *status quo ante* in the case of Walter LaGrand, that is re-establish the situation that existed before the detention of, proceedings against, and conviction and sentencing of that German national in violation of the United States' international legal obligation took place; and

(4) the United States should provide Germany a guarantee of the non-repetition of the illegal acts";

6. Whereas, on 2 March 1999, after having filed its Application, Germany also submitted an urgent request for the indication of provisional measures in order to protect its rights, pursuant to Article 41 of the Statute of the Court and to Articles 73, 74 and 75 of the Rules of Court;

7. Whereas, in its request for the indication of provisional measures, Germany refers to the basis of jurisdiction of the Court invoked in its Application, and to the facts set out and the submissions made therein; and whereas it affirms in particular that the United States has violated its obligations under the Vienna Convention;

8. Whereas, in its request for the indication of provisional measures of protection, Germany recalls that Karl LaGrand was executed on 24 February 1999, despite all appeals for clemency and numerous diplomatic interventions by the German Government at the highest level; whereas the date of execution of Walter LaGrand in the State of Arizona has been set for 3 March 1999; and whereas the request for the urgent indication of provisional measures is submitted in the interest of this latter individual; and whereas Germany emphasizes that:

> "The importance and sanctity of an individual human life are well established in international law. As recognized by Article 6 of the International Covenant on Civil and Political Rights, every human being has the inherent right to life and this right shall be protected by law";

and whereas Germany adds the following:

> "Under the grave and exceptional circumstances of this case, and given the paramount interest of Germany in the life and liberty of its nationals, provisional measures are urgently needed to protect the life of Germany's national Walter LaGrand and the ability of this Court to order the relief to which Germany is entitled in the case of Walter LaGrand, namely restoration of the *status quo ante*. Without the provisional measures requested, the United States will execute Walter LaGrand—as it did execute his brother Karl — before this Court can consider the merits of Germany's claims and Germany will be forever deprived of the opportunity to have this *status quo ante* restored in the event of a judgment in its favour";

9. Whereas, Germany asks that, pending final judgment in this case, the Court indicate that:

> "The United States should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, and it should inform the Court of all the measures which it has taken in implementation of this Order";

and whereas it asks the Court moreover to consider its request as a matter of the greatest urgency "in view of the extreme gravity and immediacy of the threat of execution of a German citizen";

10. Whereas, by a letter dated 2 March 1999, the Vice-President of the Court addressed the Government of the United States in the following terms:

> "Exercising the functions of the presidency in terms of Articles 13 and 32 of the Rules of Court, and acting in conformity with Article 74, paragraph 4, of the said Rules, I hereby draw the attention of [the] Government [of the United States] to the need to act in such a way as to enable any Order the Court will make on the request for provisional measres to have its appropriate effects";

and whereas a copy of that letter was transmitted forthwith to the German Government;

12. Whereas, on 3 March 1999, at 9.00 a.m. (The Hague time), the Vice-President of the Court received the representatives of the Parties in order to obtain information from them with regard to the subsequent course of the proceedings; whereas the representative of the German Government stated that the Governor of the State of Arizona had rejected a recommendation by the Mercy Committee that the execution of Walter LaGrand should be stayed, so that the latter would in consequence be executed this same day at 3.00 p.m. (Phoenix time); whereas he emphasized the extreme urgency of this situation; and whereas, referring to the provisions of Article 75 of the Rules of Court, he asked the Court to indicate forthwith, and without holding any hearing, provisional measures *proprio motu*; and whereas the representative of the United States pointed out that the case had been the subject of lengthy proceedings in the United States, that the request for provisional measures submitted by Germany was made at a very late date and that the United States would have strong objections to any procedure such as that proposed only that very morning by the representative of Germany which would result in the Court making an Order *proprio motu* without having first duly heard the two Parties;

13. Whereas, on a request for the indication of provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, but whereas it may not indicate them unless the provisions invoked by the Applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded;

14. Whereas, Article I of the Optional Protocol, which Germany invokes as the basis of jurisdiction of the Court in this case, is worded as follows:

> "Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any paty to the dispute being a Party to the present Protocol";

15. Whereas, according to the information communicated by the Secretary-General of the United Nations as depositary, Germany and the United States are parties to the Vienna Convention and to the Optional Protocol;

16. Whereas, in its Application Germany stated that the issues in dispute between itself and the United States concern Articles 5 and 36 of the Vienna Convention and fall within the compulsory jurisdiction of the Court under Article I of the Optional Protocol; and whereas it concluded from this that the Court has the jurisdiction necessary to indicate the provisional measures requested;

17. Whereas, in the light of the requests submitted by Germany in its Application and of the submissions made therein, there exists *prima facie* a dispute with regard to the Application of the Convention within the meaning of Article I of the Optional Protocol;

18. Whereas, the Court has satisfied itself that, *prima facie*, it has jurisdiction under Article I of the aforesaid Optional Protocol to decide the dispute between Germany and the United States;

19. Whereas, the sound administration of justice requires that a request for the indication of provisional measures founded on Article 73 of the Rules of Court be submitted in good time;

20. Whereas, Germany emphasizes that it did not become fully aware of the facts of the case until February 24, 1999 and that since then it has pursued its action at diplomatic level;

21. Whereas, under Article 75, paragraph 1, of the Rules of Court, the latter "may at any time decide to examine *proprio motu* whether the

circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the parties"; whereas a provision of this kind has substantially featured in the Rules of Court since 1936, and whereas, if the Court has not, to date, made use of the power conferred upon it by this provision, the latter appears nonetheless to be clearly established; whereas the Court may make use of this power, irrespective of whether or not it has been seised by the parties of a request for the indication of provisional measures; whereas in such a case it may, in the event of extreme urgency, proceed without holding oral hearings; and whereas it is for the Court to decide in each case if, in the light of the particular circumstances of the case, it should make use of the said power;

22. Whereas the power of the Court to indicate provisional measures under Article 41 of its Statute is intended to preserve the respective rights of the parties pending its decision, and presupposes that irreparable prejudice shall not be caused to rights which are the subject of a dispute in judicial proceedings; whereas it follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by the Court to belong either to the Applicant, or to the Respondent; and whereas such measures are only justified if there is urgency;

23. Whereas the Court will not order interim measures in the absence of "irreparable prejudice... to rights which are the subject of dispute..." *(Nuclear Tests (Australia* v. *France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, p. 103; *United States Diplomatic and Consular Staff in Tehran, Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979*, p. 19, para 36; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 19, para 34); *Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures, Order of 9 April 1998*, p. 10, para 36);

24. Whereas the execution of Walter LaGrand is ordered for 3 March 1999; and whereas such an execution would cause irreparable harm to the rights claimed by Germany in this particular case;

25. Whereas the issues before the Court in this case do not concern the entitlement of the federal states within the United States to resort to the death penalty for the most heinous crimes; and whereas, further, the function of this Court is to resolve international legal disputes between States, *inter alia* when they arise out of the interpretation or application

of international conventions, and not to act as a court of criminal appeal;

26. Whereas, in the light of the aforementioned considerations, the Court finds that the circumstances require it to indicate, as a matter of the greatest urgency and without any other proceedings, provisional measures in accordance with Article 41 of its Statute and with Article 75, paragraph 1, of its Rules;

27. Whereas measures indicated by the Court for a stay of execution would necessarily be provisional in nature and would not in any way prejudge findings the Court might make on the merits; and whereas such measures would preserve the respective rights of Germany and of the United States; and whereas it is appropriate that the Court, with the co-operation of the Parties, ensure that any decision on the merits be reached with all possible expedition;

28. Whereas the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be; whereas the United States should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings; whereas, according to the information available to the Court, implementation of the measures indicated in the present Order falls within the jurisdiction of the Governor of Arizona; whereas the Government of the United States is consequently under the obligation to transmit the present Order to the said Governor; whereas the Governor of Arizona is under the obligation to act in conformity with the international undertakings of the United States;

29. For these reasons,

THE COURT

Unanimously,

I. *Indicates* the following provisional measures;

(*a*) The United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order;

(*b*) The Government of the United States of America should transmit this Order to the Governor of the State of Arizona.

II. *Decides*, that, until the Court has given its final decision, it shall remain seised of the matters which form the subject-matter of this Order.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this third day of March, one thousand nine hundred and ninety-nine, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Federal Republic of Germany and the Government of the United States of America, respectively.

*(Signed)* Christopher G. Weeramantry,
Vice-President.

(Signed) Eduardo Valencia-Ospina,
Registrar.

Judge ODA appends a declaration to the Order of the Court.

President SCHWEBEL appends a separate opinion to the Order of the Court.

*(Initialled)* C.G.W.

*(Initialled)* E.V.O.

# DECLARATION OF JUDGE ODA

1. I voted in favour of the Court's Order with great hesitation as I considered that the request for the indication of provisional measures of protection submitted by Germany to the Court should have been dismissed. However, in the limited time—only several hours—given to the Court to deal with this matter, I have regrettably found it impossible to develop my points sufficiently to persuade my colleagues to alter their position.

2. I can, on humanitarian grounds, understand the plight of Mr.Walter LaGrand and recognize that owing to the fact that Germany filed this request as late as yesterday evening (namely, at 7.30 p.m. on 2 March 1999), his fate now, albeit unreasonably, lies in the hands of the Court.

I would like to add, however, that, if Mr.Walter LaGrand's rights as they relate to humanitarian issues are to be respected then, in parallel, the matter of the rights of victims of violent crime (a point which has often been overlooked) should be taken into consideration. It should also be noted that since his arrest, Mr.Walter LaGrand has been treated in all legal proceedings in accordance with the American judicial system governed by the rule of law.

The Court cannot act as a court of criminal appeal and cannot be petitioned for writs of *habeas corpus*. The Court does not have jurisdiction to decide matters relating to capital punishment and its execution, and should not intervene in such matters. Whether capital punishment would be contrary to Article 6 of the 1996 International Covenant on Civil and Political Rights is not a matter to be determined by the International Court of Justice — at least in the present situation.

3. As I stated earlier, Germany's request was presented to the Court at 7.30 p.m. on 2 March 1999 in connection with and at the same time as its Application instituting proceedings against the United States for violations of the 1963 Vienna Convention on Consular Relations. Mr.Walter LaGrand was brought to the domestic courts of the United States for the alleged murder which took place in 1982.

If there was any dispute between Germany and the United States concerning the interpretation or application of the Vienna Convention, it could have been that the United States was presumed to have violated the Convention at the time of the arrest of Mr. Walter LaGrand, as the United States did not inform the German consular officials of the event. In fact, the German consular officials were not aware of the situation until 1992 and only learned of it from Mr. Walter LaGrand himself.

4. What did Germany ask the Court to decide in its request for the indication of provisional measures of protection on 2 March 1999? Germany asked mainly for a decision relating to Mr.Walter LaGrand's personal situation, namely, his pending execution by the competent authorities of the State of Arizona, which Germany did not attempt to deal with until yesterday.

Germany requested the restoration of the *status quo ante*. However, if consular contact had occurred at the time of Mr.Walter LaGrand's arrest or detention, the judicial procedure in the United States domestic courts relating to his case would have been no different.

5. I would like to turn to some general issues relating to provisional measures. First, as a general rule, provisional measures are granted in order to preserve *rights of States* exposed to an imminent breach which is irreparable and these *rights of States* must be those to be considered at the merits stage of the case, and must constitute the subject-matter of the application instituting proceedings or be *directly* related to it. In this case, however, there is no question of such rights (of States parties), as provided for by the Vienna Convention, being exposed to an imminent irreparable breach.

I would like to reiterate that the request for the indication of provisional measures must essentially be related to the application instituting proceedings presented by the State. The fact that the United States failed to notify the German consular authorities of the arrest, detention and trial of Mr.Walter LaGrand and that Germany did not until yesterday take steps before this Court, is not — however much it may appear to be — *directly* related to the imminent execution of that German national. The purpose of provisional measures is to preserve the rights of States exposed to an imminent breach with is irreparable.

6. If the request in the present case had not been granted, the Application itself would have become meaningless. If that had been the case, then I would have had no hesitation in pointing out that the request for provisional measures should not be used to ensure that the main Application continues. In addition, the request for provisional measures should not be used by applicants for the purpose of obtaining interim judgments that would affirm their own rights and predetermine the main case.

If the Court intervenes *directly* in the fate of an individual, this would mean some departure from the function of the principal judicial organ of the United Nations, which is essentially a tribunal set up to settle inter-State disputes concerning the rights and duties of States. I fervently hope that this case will not set a precedent in the history of the Court.

While I consider that the International Court of Justice should be utilized more frequently in the world, I cannot condone the use of the Court for such matters as the above under the pretext of the protection of human rights.

7. I have thus explained why I formed the view that, given the fundamental nature of provisional measures, those measures should not have been indicated upon Germany's request. I reiterate and emphasize that I voted in favour of the Order solely for humanitarian reasons.

## SEPARATE OPINION OF PRESIDENT SCHWEBEL

The issuance of today's Order indicating provisional measures is unprecedented. It is to be hoped that it will not form a precedent, for it departs in critical measure from a basic rule of the judicial process. The Order has been issued on the basis of one party's views, without hearing the other. It is unprecedented in a further respect as well, for it is the first case in which the Court has issued an Order on its own motion, pursuant to Article 75, paragraph 1, of the Rules of Court providing that:

> "1. The Court may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the parties".

Whether the Court has acted in correct application of that Rule is open to question. The Rule assumes that the Court may act on its own motion where a party has not made a request for the indication of provisional measures. But the Court's consideration of the matter in this case has only been provoked by Germany's Application and its request for provisional measures. Article 74 of the Rules provides that, where a party makes such a request, the Court shall arrange "a hearing which will afford the parties an opportunity of being represented at it". No such hearings have been held, arranged or contemplated in the current case.

Under Article 75, paragraph 1, the Court may issue an order of provisional measures without giving the parties the opportunity to be heard. That is an extraordinary power, to be exercised with the utmost caution. There may be room to question whether sovereign States should be subjected to the Court's restraints *pendente lite* without giving them the opportunity to be heard. But if in extreme circumstances they are to be so subject, then the Court should act in meticulous conformity with its Rules. Its Rules do not contemplate it so acting where a party has—as Germany here—made a request for the indication of provisional measures.

Moreover, the Court has done so on the basis only of Germany's Application. It has no other pleading, no other basis for the indication of provisional measures, before it. Is proceeding in this way consistent with fundamental rules of the procedural equality of the parties?

My doubts are confirmed by a reading of the most authoritative work in the field, Jerzy Sztucki's *Interim Measures in The Hague Court* (1983). Professor Sztucki concludes that the Court may indicate

provisional measures *proprio motu* "without any request for interi measures". He adds that only such a case "qualifies as an action *propri motu* in the meaning of Article 75 (1) of the present Rules", and h reaches that conclusion after a careful examination of prior versions o the Rules of Court and the pertinent *travaux préparatoirés* of all version (at p. 158). But in this case, the Court has had such a request, and it i on the basis of the contents of Germany's accompanying Applicatio that the Court has acted—all without affording the United States a hearin or the opportunity to present written observations.

Germany could have brought its Application years ago, months ago, weeks ago, or days ago. Had it done so, the Court could have proceeded as it has proceeded since 1922 and held hearings on the request for provisional measures. But Germany waited until the eve of execution and then brought its Application and request for provisional measures, at the same time arguing that no time remained to hear the United States and that the Court should act *proprio motu*.

I do not oppose the substance of the Court's Order, and accordingly have not voted against it. I have the profound reservations about the procedures followed both by the Applicant and the Court.

OFFICIAL DOCUMENTS

# I. DOCUMENTS RELATING TO INTERNATIONAL CRIMINAL COURT

## 1. FINAL ACT OF THE UNITED NATIONS DIPLOMATIC CONFERENCE OF PLENIPOTENTIARIES ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT

### DONE AT ROME ON 17 JULY 1998

1. The General Assembly of the United Nations, in its resolution 1/207 of 17 December 1996, decided to hold a diplomatic conference f plenipotentiaries in 1998 with a view to finalizing and adopting a onvention on the establishment of an international criminal court.

2. The General Assembly, in its resoltion 52/160 of 15 December 997, accepted with deep appreciation the generous offer of the iovernment of Italy to act as host to the conference and decided to old the United Nations Diplomatic Conference of Plenipotentiaries on ne Establishment of an International Criminal Court in Rome from 15 une to 17 July 1998.

3. Previously, the General Assembly, in its resolution 44/39 of 4 ecember 1989, had requested the International Law Commission to ddress the question of establishing an international criminal court; in esolutions 45/41 of 28 November 1990 and 46/54 of 9 December 1991, nvited the Commission to consider further and analyse the issues oncerning the question of an international criminal jurisdiction, ncluding the question of establishing an international criminal court; nd in resolutions 47/33 of 25 November 1992 and 48/31 of 9 December 993, requested the Commission to elaborate the draft statute for such court as a matter of priority.

4. The International Law Commission considered the question of stablishing an international criminal court from its forty-second session, 1990, to its forty-sixth session, in 1994. At the latter session, the ommission completed a draft statute for an international criminal court, hich was submitted to the General Assembly.

5. The General Assembly, in its resolution 49/53 of 9 December 994, decided to establish an *ad hoc* committee to review the major ıbstantive and administrative issues arising out of the draft statute

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*Source*: U.N. Doc.A/CONF.183/10, 17 July 1998.

prepared by the International Law Commission and, in light of t review, to consider arrangements for the convening of an internatio conference of plenipotentiaries.

6. The *Ad Hoc* Committee on the Establishment of an Internatio Criminal Court met from 3 to 13 April and from 14 to 25 August 19 during which time the Committee reviewed the issues arising out of t draft statute prepared by the International Law Commission a considered arrangements for the convening of an internation conference.

7. The General Assembly, in its resolution 50/46 of 11 Decemb 1995, decided to establish a preparatory committee to discuss furth the major substantive and administrative issues arising out of the dra statute prepared by the International Law Commission and, taking int account the different views expressed during the meetings, to draft text with a view to preparing a widely acceptable consolidated text of convention for an international criminal court as a next step toward consideration by a conference of plenipotentiaries.

8. The Preparatory Committee on the Establishment of a International Criminal Court met from 25 March to 12 April and fron 12 to 30 August 1996, during which time the Committee discussed furthe the issues arising out of the draft statute and began preparing a widel acceptable consolidated text of a convention for an international crimina court.

9. The General Assembly, in its resolution 51/207 of 17 Decembe 1996, decided that the Preparatory Committee would meet in 1997 an 1998 in order to complete the drafting of the text for submission to th Conference.

10. The Preparatory Committee met from 11 to 21 February, fron 4 to 15 August and from 1 to 12 December 1997, during which time th Committee continued to prepare a widely acceptable consolidated tex of a convention for an international criminal court.

11. The General Assembly, in its resolution 52/160 of 15 Decembe 1997, requested the Preparatory Committee to continue its work i accordance with General Assembly resolution 51/207 and, at the en of its sessions, to transmit to the Conference the text of a draft conventio on the establishment of an international criminal court prepared i accordance with its mandate.

12. The Preparatory Committee met from 16 March to 3 April 1998 during which time the Committee completed the preparation of the draf Convention on the Establishment of an International Criminal Court

hich was transmitted to the Conference.

13. The Conference met at the headquarters of the Food and griculture Organization of the United Nations in Rome from 15 June 17 July 1998.

14. The General Assembly, in its resolution 52/160, requested the ecretary-General to invite all States members of the United Nations or embers of specialized agencies or of the International Atomic Energy gency to participate in the Conference. The delegations of 160 States articipated in the Conference. The list of participating States is ontained in annex II.

15. The General Assembly, in the same resolution, requested the ecretary-General to invite representatives of organizations and other ntities that had received a standing invitation from the Assembly ursuant to its relevant resolutions to participate as observers in its ssions and work, on the understanding that such representatives would articipate in that capacity, and to invite, as observers to the Conference, presentatives of interested regional intergovernmental organizations d other interested international bodies, including the International ribunals for the Former Yugoslavia and for Rwanda. The list of such ganizations which were represented at the Conference by an observer contained in annex III.

16. The Secretary-General, pursuant to the same resolution, invited on-governmntal oranizations accredited by the Preparatory Committee ith due regard to the provisions of section VII of Economic and Social ouncil resolution 1996/31 of 25 July 1996, and in particular to the levance of their activities to the work of the Conference, to participate the Conference, along the lines followed in the Preparatory Committee d in accordance with the resolution, as well as the rules of procedure be adopted by the Conference. The list of non-governmental ganizations represented at the Conference by an observer is contained annex IV.

17. The Conference elected Mr. Giovanni Conso (Italy) as President.

18. The Conference elected as Vice-Presidents the representatives the following States: Algeria, Austria, Bangladesh, Burkina Faso, hina, Chile, Colombia, Costa Rica, Egypt, France, Gabon, Germany, dia, Iran (Islamic Republic of), Japan, Kenya, Latvia, Malawi, Nepal, igeria, Pakistan, Russian Federation, Samoa, Slovakia, Sweden, the rmer Yugoslav Republic of Macedonia, Trinidad and Tobago, United ingdom of Great Britain and Northern Ireland, United Republic of nzania, United States of America and Uruguay.

The following committees were set up by the Conference:

*General Committee*

*Chairman* : The President of the Conference

*Members* : The President and Vice-Presidents of the Conference, the Chairman of the Committee of the Whole and the Chairman of the Drafting Committee

*Committee of the Whole*

*Chairman* : Mr. Philippe Kirsch (Canada)

*Vice-Chairman*: Ms. Silvia Fernandez de Gurmendi (Argentina), Mr. Constantin Virgil Ivan (Romania) and Mr. Phakiso Mochochoko (Lesotho)

*Rapporteur*: Mr. Yasumasa Nagamine (Japan)

*Drafting Committee*

*Chairman* : Mr. M. Cherif Bassiouni (Egypt)

*Members* : Cameroon, China, Dominican Republic, France, Germany, Ghana, India, Jamaica, Lebanon, Mexico, Morocco, Philippines, Poland, Republic of Korea, Russian Federation, Slovenia, South Africa, Spain, Sudan, Switzerland, Syrian Arab Republic, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela.

The Rapporteur of the Committee of the Whole participated *ex officio* in the work of the Drafting Committee in accordance with rule 49 of the rules of procedure of the Conference.

*Credentials Committee*

*Chairman* : Ms. Hannelore Benjamin (Dominica)

*Members* : Argentina, China, Cote d'Ivoire, Dominica, Nepal, Norway, Russian Federation, United States of America and Zambia.

20. The Secretary-General was represented by Mr. Hans Corell, Under-Secretary-General & the Legal Counsel. Mr.Roy S. Lee, Director of the Codification Division of the Office of Legal Affairs, acted as Executive Secretary. The secretariat was further composed as follows: Mr.Manuel Rama-Montaldo, Secretary, Drafting Committee, Ms.Mahnoush H. Arsanjani, Secretary, Committee of the Whole, Mr.Mpazi Sinjela, Secretary, Credentials Committee; Assistant Secretaries of the Conference, Ms.Christiane Bourloyannis-Vrailas, Ms.Virginia Morris, Mr.Vladimir Rudnitsky, Mr.Renan Villacis.

21. The Conference had before it a draft Statute on the Establishment of an International Criminal Court transmitted by the Preparatory Committee in accordance with its mandate (A/CONF.183/2/Add.1).

22. The Conference assigned to the Committee of the Whole the consideration of the draft Convention on the Establishment of an International Criminal Court adopted by the Prepratory Committee. The Conference entrusted the Drafting Committee, without reopening substantive discussion on any matter, with coordinating and refining the drafting of all texts referred to it without altering their substance, formulating drafts and giving advice on drafting as requested by the Conference or by the Committee of the Whole and reporting to the Conference or to the Committee of the Whole as appropriate.

23. On the basis of the deliberations recorded in the records of the Conference (A/CONF.183/SR.1 to SR.9) and of the Committee of the Whole (A/CONF.183/C.1/SR.1 to SR.42) and the reports of the Committee of the Whole (A/CONF.183/8) and of the Drafting Committee (A/CONF.183/C.1/L.64, L.65/Rev. 1, L.66 and Add.1, L.67/Rev.1, L.68/Rev.2, L.82-L.88 and 91), the Conference drew up the Rome Statute of the International Criminal Court.

24. The foregoing Statute, which is subject to ratification, acceptance or approval, was adopted by the Conference on 17 July 1998 and opened for signature on 17 July 1998, in accordance with its provisions, until 17 October 1998 at the Ministry of Foreign Affairs of Italy and, subsequently, until 31 December 2000, at United Nations Headquarters in New York. The same instrument was also opened for accession in accordance with its provisions.

25. After 17 October 1998, the closing date for signature at the Ministry of Foreign Affairs of Italy, the Statute will be deposited with the Secretary-General of the United Nations.

26. The Conference also adopted the following resolutions, which are annexed to the present Final Act:

1. *Tribute to the International Law Commission*
2. *Tribute to the participants at the Preparatory Committee on the Establishment of an International Criminal Court and its Chairman*
3. *Tribute to the President of the Conference, to the Chairman of the Committee of the Whole and to the Chairman of the Drafting Committee*
4. *Tribute to the People and the Government of Italy*
5. *Resolution on treaty crimes*
6. *Resolution on the Establishment of the Preparatory Commission for the International Criminal Court*

IN WITNESS WHEREOF the representatives have signed this Final Act.

DONE at Rome this seventeenth day of July, one thousand nine hundred and ninety-eight, in a single copy in the Arabic, Chinese, English, French, Russian and Spanish languages, each text being equally authentic

By unanimous decision of the Conference, the original of this Final Act shall be deposited in the archives of the Ministry of Foreign Affairs of Italy.

The President of the Conference — Giovanni Conso

The Representative of the Secretary-General: — Hans Corell

The Executive Secretary of the Conference: — Roy S. Lee

## ANNEX I

### Resolution adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

**A**

*The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court,*

*Resolves* to express its deep gratitude to the International Law Commission for its outstanding contribution in the preparation of the original draft of the Statute, which constituted the basis for the work of the Preparatory Committee.

**B**

*The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court,*

*Pays tribute* to the participants of the Preparatory Committee on the Establishment of an International Criminal Court and its Chairman, Mr.Adriaan Bos, for their outstanding and hard work, commitment and dedication.

**C**

*The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*

*Expresses its deep appreciation and gratitude* to the people and the Government of Italy for making the necessary arrangements for the holding of the Conference in Rome, for their generous hospitality and for their contribution to the successful completion of the work of the Conference.

**D**

*The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court,*

*Expresses its appreciation and thanks* to Mr.Giovanni Conso, President of the Conference, Mr. Philippe Kirsch, Chairman of the Committee of the Whole, and Mr. M. Cherif Bassiouni, Chairman of the Drafting Committee, who, through their experience, skilful efforts and wisdom in steering the work of the Conference, contributed greatly to the success of the Conference.

**E**

*The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court,*

*Having adopted* the Statute of an International Criminal Court,

*Recognizing* that terrorist acts, by whomever and wherever perpetrated and whatever their forms, methods or motives, are serious

crimes of concern to the international community,

*Recognizing* that the international trafficking of illicit drugs is a very serious crime, sometimes destabilizing the political and social and economic order in States,

*Deeply alarmed* at the persistence of these scourges, which pose serious threats to international peace and security,

*Regretting* that no generally acceptable definition of the crimes could be agreed upon for the inclusion within the jurisdiction of the Court,

*Affirming* that the Statute of the International Criminal Court provides for a review mechanism, which allows for an expansion in future of the jurisdiction of the Court,

*Recommends* that a Review Conference pursuant to article 111 of the Statute of the International Criminal Court consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court.

**F**

*The United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court,*

*Having adopted* the Statute of the International Criminal Court,

*Having decided* to take all possible measures to ensure the coming into operation of the International Criminal Court without undue delay and to make the necessary arrangements for the commencement of its functions,

*Having decided* that a preparatory commission should be established for the fulfilment of these purposes;

*Decides* as follows:

1. There is hereby established the Preparatory Commission for the International Criminal Court. The Secretary-General of the United Nations shall convene the Commission as early as possible at a date to be decided by the General Assembly of the United Nations.

2. The Commission shall consist of representatives of States which have signed the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court and other States which have been invited to participate in the Conference.

3. The Commission shall elect its Chairman and other officers, adopt its rules of procedure and decide on its programme of work. These

elections shall take place at the first meeting of the Commission.

4. The official and working languages of the Preparatory Commission shall be those of the General Assembly of the United Nations.

5. The Commission shall prepare proposals for practical arrangements for the establishment and coming into operation of the Court, including the draft texts of:

(*a*) Rules of Procedure and Evidence;

(*b*) Elements of Crimes;

(*c*) A relationship arrangement between the Court and the United Nations;

(*d*) Basic principles governing a headquarters agreement to be negotiated between the Court and the host country;

(*e*) Financial regulations and rules;

(*f*) An agreement on the privileges and immunities of the Court;

(*g*) A budget for the first financial year;

(*h*) The rules of procedure of the Assembly of States Parties.

6. The draft texts of the Rules of Procedure and Evidence and of the Elements of Crimes shall be finalized before 30 June 2000.

7. The Commission shall prepare proposals for a provision on aggression, including the definition and elements of crimes of aggression and the conditions under which the International Criminal Court shall exercise its jurisdiction with regard to this crime. The Commission shall submit such proposals to the Assembly of States Parties at a Review Conference, with a view to arriving at an acceptable provision on the crime of aggression for inclusion in its Statute. The provisions relating to the crime of aggression shall enter into force for the States Parties in accordance with the relevant provisions of this Statute.

8. The Commission shall remain in existence until the conclusion of the first meeting of the Assembly of States Parties.

9. The Commission shall prepare a report on all matters within its mandate and submit it to the first meeting of the Assembly of States Parties.

10. The Commission shall meet at the Headquarters of the United Nations. The Secretary-General of the United Nations is requested to provide to the Commission such secretariat services as it may require, subject to the approval of the General Assembly of the United Nations.

11. The Secretary-General of the United Nations shall bring the present resolution to the attention of the General Assembly for any necessary action.

## ANNEX II

### LIST OF STATES PARTICIPATING IN THE UNITED NATIONS DIPLOMATIC CONFERENCE OF PLENIPOTENTIARIES ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT

Afghanistan
Albania
Algeria
Andorra
Angola
Argentina
Armenia
Australia
Austria
Azerbaijan
Bahrain
Bangladesh
Barbados
Belarus
Belgium
Benin
Bolivia
Bosnia and Herzegovina
Botswana
Brazil
Brunei Darussalam
Bulgaria
Burkina Faso
Burundi
Cameroon
Canada
Cape Verde
Finland
France
Gabon
Georgia
Germany
Ghana
Greece
Gautemala
Guinea
Guinea-Bissau
Haiti
Holy See
Honduras
Hungary
Iceland
India
Indonesia
Iran (Islamic Republic of)
Iraq
Ireland
Israel
Italy
Jamaica
Japan
Jordan
Kazakhstan
Kenya

Central African Republic
Chad
Chile
China
Colombia
Comoros
Congo
Costa Rica
Côte d'Ivoire
Croatia
Cuba
Cyprus
Czech Republic
Democratic Republic of the Congo
Denmark
Djibouti
Domonica
Dominican Republic
Ecuador
Egypt
El Salvador
Eritrea
Estonia
Ethiopia
Netherlands
New Zealand
Nicaragua
Niger
Nigeria
Norway
Oman
Pakistan
Panama
Paraguay

Kuwait
Kyrgyzstan
Lao Peoples Democratic Republic
Latvia
Lebanon
Lesotho
Liberia
Libyan Arab Jamahiriya
Liechtenstein
Lithuania
Luxembourg
Madagascar
Malawi
Malaysia
Mali
Malta
Mauritania
Mauritius
Mexico
Monaco
Morocco
Mozambique
Namibia
Nepal
South Africa
Spain
Sri Lanka
Sudan
Swaziland
Sweden
Switzerland
Syrian Arab Republic
Tajikistan
Thailand

Peru
Philippines
Poland
Portugal
Qatar
Republic of Korea
Republic of Moldova
Romania
Russian Federation
Rwanda
Samoa
San Marino
Sao Tome and Principe
Saudi Arabia
Senegal
Sierra Leone
Singapore
Slovakia
Slovenia
Solomon Islands
The former Yugoslav Republic of Macedonia
Togo
Trinidad and Tobago
Tunisia
Turkey
Uganda
Ukraine
United Arab Emirates
United Kingdom of Great Britain and Northern Ireland
United Republic of Tanzania
United States of America
Uruguay
Uzbekistan
Venezuela
Vietnam
Yemen
Zambia
Zimbabwe

## ANNEX III

### LIST OF ORGANIZATIONS AND OTHER ENTITIES REPRESENTED AT THE CONFERENCE BY AN OBSERVER

*Organizations*

Palestine

*Intergovernmental organizations and other entities*

Agence de Cooperation Culturelle et Technique (A.C.C.T.)

Asian-African Legal Consultative Committee (AALCC)

Council of Europe

European Community

European Court of Human Rights

Humanitarian Fact-Finding Commission

Inter-American Institute of Human Rights

Intenational Committee of the Red Cross (ICRC)

International Criminal Police Organization (INTERPOL)

International Federation of Red Cross and Red Crescent Societies

Inter-Parliamentary Union

League of Arab States

Organization of African Unity

Organization of American States

Organization of the Islamic Conference (OIC)

Sovereign Military Order of Malta

*Specialized agencies and related organizations*

International Labour Organization (ILO)

Food and Agriculture Organization of the United Nations (FAO)

United Nations Educational, Scientific and Cultural Organization (UNESCO)

International Fund for Agricultural Development (IFAD)

International Atomic Energy Agency (IAEA)

*United Nations programmes and bodies*

United Nations Children's Emergency Fund (UNICEF)

Office of the United Nations High Commissioner for Refugees (UNHCR)

United Nations Commission on Crime Prevention and Criminal Justice

United Nations Office of the High Commissioner for Human Rights

United Nations Office at Vienna, Office for Drug Control and Crime Prevention

International Criminal Tribunal for Rwanda

International Tribunal for the Former Yugoslavia

International Law Commission (ILC)

World Food Programme

## ANNEX IV

## LIST OF NON-GOVERNMENTAL ORGANIZATIONS REPRESENTED AT THE CONFERENCE BY AN OBSERVER

Agir ensemble pour les droits de l'homme (Woking Together for Human Rights)

American Association for the International Commission of Jurists

American Association of Jurists

American Bar Association

Amnesty International

Arab Lawyers Union

Asia Pacific Forum on Women, Law and Development

Asian Center for Women's Human Rights

Asian Women's Human Rights Council

Associacion por Derechos Humanos (APRODEH, Association for Human Rights)

Australian Lawyers for Human Rights

Bahai' International Community

Bangladesh Legal Aid and Services Trust

Bar Human Rights Committee of England and Wales

Cairo Institute for Human Rights Studies

Canadian Network for an ICC/World Federalists of Canada

Carter Center

Center for Civil Human Rights

Center for Development of International Law

Center for Human Rights and Rehabilitation

Center for Reproductive Law and Policy

Children's Fund of Canada, Inc.

Colombian Commission of Jurists

Comite de Defensa do los Derechos Humanos y del Pueblo (Committee for the Defence of Human Rights and of the People)

Coalition for International Justice

Comite Latinoamericano y del Caribe para la Defensa de los Derechos de la Mujer (CLADEM; Latin American and Caribbean Committee for the Defence of Women's Rights)

Commission of Churches on International Affairs of the World Council of Churches

Committee of Former Nuremberg Prosecutors

Community Law Center

Conseil national des barreaux (National Bar Council)

Coordinating Board of Jewish Organizations

Corporation Colectivo de Abogados "Jose Alvear Restrepo Lawyers Collective Association)

Corporacion de Desarrolo de la Mujer (La Morada; Association for the Development of Women)

# 2. ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

## Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998

Preamble

**Conscious** that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,

**Mindful** that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

**Recognizing** that such grave crimes threaten the peace, security and well-being of the world,

**Affirming** that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

**Determined** to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

**Recalling** that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

**Reaffirming** the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,

**Emphasizing** in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict in the internal affairs of any State,

**Determined** to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole.

**Emphasizing** that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,

**Resolved** to guarantee lasting respect for the enforcement of international justice,

Have agreed as follows:

## PART 1. ESTABLISHMENT OF THE COURT

### Article 1
### The Court

An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

### Article 2
### Relationship of the Court with the United Nations

The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.

### Article 3
### Seat of the Court

1. The seat of the Court shall be established at The Hague in the Netherlands ("the host State").

2. The Court shall enter into a headquarters agreement with the host State, to be approved by the Assembly of States Parties and thereafter concluded by the President of the Court on its behalf.

3. The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute.

### Article 4
### Legal status and powers of the Court

1. The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

2. The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.

## PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

### Article 5
### Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(*a*) The crime of genocide;

(*b*) Crimes against humanity;

(*c*) War crimes;

(*d*) The crime of aggression.

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

### Article 6
### Genocide

For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(*a*) Killing members of the group;

(*b*) Causing serious bodily or mental harm to members of the group;

(*c*) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(*d*) Imposing measures intended to prevent births within the group;

(*e*) Forcibly transferring children of the group to another group.

### Article 7
### Crimes against humanity

1. For the purpose of this Statute, "crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(*a*) Murder;

(*b*) Extermination;

(*c*) Enslavement;

(*d*) Deportation or forcible transfer of population;

(*e*) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(*f*) Torture;

(*g*) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(*h*) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(*i*) Enforced disappearance of persons;

(*j*) The crime of apartheid;

(*k*) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

(*a*) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organization policy to commit such attack;

(*b*) "Extermination" includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(*c*) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(*d*) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(*e*) "Torture" means the intentional infliction of severe pain o suffering, whether physical or mental, upon a person in th custody or under the control of the accused; except that tortur shall not include pain or suffering arising only from, inherent i or incidental to, lawful sanctions;

(*f*) "Forced pregnancy" means the unlawful confinement, of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(*g*) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(*h*) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(*i*) "Enforced disappearance of persons: means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

## Article 8
## War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as a part of a plan or policy or as part of a large scale commission of such crimes.

2. For the purpose of this Statute, "war crimes" means:

(*a*) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property

protected under the provisions of the relevant Geneva Conventions;

(*i*) Wilful killing;

(*ii*) Torture or inhuman treatment, including biological experiments;

(*iii*) Wilfully causing great suffering, or serious injury to body or health;

(*iv*) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(*v*) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(*vi*) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(*vii*) Unlawful deportation or transfer or unlawful confinement;

(*viii*) Taking of hostages;

(*b*) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts;

(*i*) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives,

(*ii*) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(*iv*) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(*v*) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

(*vi*) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(*vii*) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(*viii*) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(*ix*) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objects;

(*x*) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(*xi*) Killing or wounding treacherously individuals belonging to the hostile nation or army;

(*xii*) Declaring that no quarter will be given;

(*xiii*) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(*xiv*) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(*xv*) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(*xvi*) Pillaging a town or place, even when taken by assault;

(*xvii*) Employing poison or poisoned weapons;

(*xviii*) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(*xix*) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(*xx*) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

(*xxi*) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(*xxii*) Committing rape, sexual slavery, enforced prostituion, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(*xxiii*) Utilizing the presence of a civilian or other protectd person to render certain points, areas or military forces immune from military operations;

(*xxiv*) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(*xxv*) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(*xxvi*) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(*c*) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause;

(*i*) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(*ii*) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(*iii*) Taking of hostages;

(*iv*) The passing of sentences and the carrying out of executio without previous judgment pronounced by a regularl constituted court, affording all judicial guarantees whic are generally recognized as indispensable.

(*d*) Paragraph 2(c) applies to armed conflicts not of an internationa character and thus does not apply to situations of interna disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature;

(*e*) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts;

(*i*) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(*ii*) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(*iii*) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the law of armed conflict;

(*iv*) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(*v*) Pillaging a town or place, even when taken by assault;

(*vi*) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2(f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(*vii*) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(*viii*) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(*ix*) Killing or wounding treacherously a combatant adversary;

(*x*) Declaring that no quarter will be given;

(*xi*) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(*xii*) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(*f*) Paragraph 2(e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraph 2(c) and (d) shall affect the responsibility of a Government to maintain or establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

**Article 9**
**Elements of Crimes**

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

2. Amendments to the Elements of Crimes may be proposed by;

(*a*) Any State Party;

(*b*) The judges acting by an absolute majority;

(*c*) The Prosecutor;

Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

3. The Elements of Crimes and amendments thereto shall be consistent with this Statute.

**Article 10**

Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

**Article 11**
**Jurisdiction *ratione temporis***

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.

2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to the crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

**Article 12**
**Preconditions to the exercise of jurisdiction**

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3;

(*a*) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(*b*) The State of which the person accused of the crime is a national;

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

**Article 13**
**Exercise of jurisdiction**

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

(*a*) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;

(*b*) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations, or

(*c*) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

**Article 14**
**Referral of a situation by a State Party**

1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

**Article 15**
**Prosecutor**

1. The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.

2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.

3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the pre-trial chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the pre-trial chamber, in accordance with the Rules of Procedure and Evidence.

4. If the pre-trial chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

5. The refusal of the pre-trial chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the

Prosecutor based on new facts or evidence regarding the same situation.

6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

**Article 16**
**Deferral of investigation or prosecution**

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

**Article 17**
**Issues of admissibility**

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

(*a*) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(*b*) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(*c*) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

(*d*) The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(*a*) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from crminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(*b*) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(*c*) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice;

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

**Article 18**
**Preliminary rulings regarding admissibility**

1. When a situation has been referred to the Court pursuant to article 13(a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to articles 13(c) and 15, the Prosector shall notify all States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, may limit the scope of the information provided to States.

2. Within one monh of receipt of that notice, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.

3. The Prosecutor's deferral to a State's investigation shall be open o review by the Prosecutor six months after the date of deferral or at ny time when there has been a significant change of circumstances ased on the State's unwillingness or inability genuinely to carry out he investigation.

4. The State concerned or the Prosecutor may appeal to the Appeals hamber against a ruling of the Pre-Trial Chamber, in accordance with rticle 82, paragraph 2. The appeal may be heard on an expedited basis.

5. When the Prosecutor has deferred an investigation in accordance ith paragraph 2, the Prosecutor may request that the State concerned

periodically inform the Prosecutor of the progress of its investigatio and any subsequent prosecutions. States Parties shall respond to su requests without undue delay.

6. Pending a ruling by the Pre-Trial Chamber, or at any time wh the Prosecutor has deferred an investigation under this article, th Prosecutor may, on an exceptional basis, seek authority from the Pr Trial Chamber to pursue necessary investigative steps for the purpos of preserving evidence where there is a unique opportunity to obtai evidence or there is a significant risk that such evidence may not b subsequently available.

7. A State which has challenged a ruling of the Pre-Trial Chambe under this article may challenge the admissibility of a case under articl 19 on the grounds of additional significant facts or significant chang of circumstances.

**Article 19**
**Challenges to the jurisdiction of the Court or the admissibility of a case**

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with artice 17.

2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:

(*a*) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;

(*b*) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or

(*c*) A State from which acceptance of jurisdiction is required under article 12.

3. The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.

4. The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the

commencement of the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c).

5. A State referred to in paragraph 2(b) and (c) shall make a challenge at the earliest opportunity.

6. Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the charges, they shall be referred to the Trial Chamber. Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82.

7. If a challenge is made by a State referred to in paragraph 2(b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17.

8. Pending a ruling by the Court, the Prosecutor may seek authority from the Court:

(*a*) To pursue necessary investigative steps of the kind referred to in article 18, paragraph 6;

(*b*) To take a statement or testimony from a witness or complete the collection and examination of evidence which has begun prior to the making of the challenge, and

(*c*) In cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58.

9. The making of challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge.

10. If the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17.

11. If the Prosecutor, having regard to the matters referred to in article 17, defers an investigation, the Prosecutor may request that the relevant State make available to the Prosecutor information on the proceedings. That information shall, at the request of the State concerned, be confidential. If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State in respect of the proceedings of which deferral has taken place.

## Article 20
### *Ne bis in idem*

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

2. No person shall be tried before another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.

3. No person who has been tried by another court for conduct also proscribed under articles 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

(*a*) Were for the purpose of sheilding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court, or (*b*) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

## Article 21
### Applicable law

1. The Court shall apply:

(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender, as defined in article 7, paragraph 3, age, race, colour, language, religion or belief; political or other opinion, national, ethnic or social origin, wealth, birth or other status.

# PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW

## Article 22
## *Nullum crimen sine lege*

1. A person shall not be criminally responsible under this Statute less the conduct in question constitutes, at the time it takes place, a me within the jurisdiction of the Court.

2. The definition of a crime shall be strictly construed and shall not extended by analogy. In case of ambiguity, the definition shall be erpreted in favour of the person being investigated, prosecuted or nvicted.

3. This article shall not affect the characterization of any conduct as minal under international law independently of this Statute.

## Article 23
## *Nulla poena sine lege*

A person convicted by the Court may be punished only in accordance th this Statute.

## Article 24
## Non-retroactivity *ratione personae*

1. No person shall be criminally responsible under this Statute for nduct prior to the entry into force of the Statute.

2. In the event of a change in the law applicable to a given case or to a final judgment, the law more favourable to the person being vestigated, prosecuted or convicted shall apply.

## Article 25
## Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant this Statute.

2. A person who commits a crime within the jurisdiction of the Court all be individually responsible and liable for punishment in accordance h this Statute.

3. In accordance with this Statute, a person shall be criminally ponsible and liable for punishment for a crime within the jurisdiction the Court if that person:

(*a*) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that

other person is criminally responsible;

(*b*) Orders, solicits or induces the commission of such a crime whic in fact occurs or is attempted,

(*c*) For the purpose of facilitating the commission of such a crim aids, abets or otherwise assists in its commission or its attempte commission, including providing the means for its commissio

(*d*) In any other way contributes to the commission or attempte commission of such a crime by a group of persons acting with common purpose. Such contribution shall be intentional and sha either:

(*i*) Be made with the aim of furthering the criminal activity o criminal purpose of the group, where such activity or purpos involves the commission of a crime within the jurisdictio of the Court; or

(*ii*) Be made in the knowledge of the intention of the group tc commit the crime;

(*e*) In respect of the crime of genocide, directly and publicly incite others to commit genocide;

(*i*) Attempts to commit such a crime by taking action tha commences its execution by means of a substantial step, bu the crime does not occur because of circumstance independent of the person's intentions. However, a persor who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable fo punishment under this Statute for the attempt to commit tha crime if that person completely and voluntarily gave up the criminal purpose.

4. No provision in this Statute relating to individual crimina responsibility shall affect the responsibility of States under internationa law.

## Article 26
## Exclusion of jurisdiction over persons under eighteen

The Court shall have no jurisdiction over any person who was unde the age of 18 at the time of the alleged commission of a crime.

## Article 27
## Irrelevance of official capacity

1. This Statute shall apply equally to all persons without an distinction based on official capacity. In particular, official capacity a

Head of State or Government, a member of a Government or ırliament, an elected representative or a government official shall in case exempt a person from criminal responsibility under this Statute, r shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the ficial capacity of a person, whether under national or international w, shall not bar the Court from exercising its jurisdiction over such a rson.

**Article 28**
**Responsibility of commanders and other superiors**

In addition to other grounds of criminal responsibility under this atute for crimes within the jurisdiction of the Court:

1. A military commander or person effectively acting as a military mmander shall be criminally responsible for crimes within the risdiction of the Court committed by forces under his or her effective mmand and control, or effective authority and control as the case ay be, as a result of his or her failure to exercise control properly over ch forces, where:

(*a*) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(*b*) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

2. With respect to superior and subordinate relationships not scribed in paragraph 1, a superior shall be criminally responsible for mes within the jurisdiction of the Court committed by subordinates der his or her effective authority and control, as a result of his or her lure to exercise control properly over such subordinates, where:

(*a*) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(*b*) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(*c*) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

### Article 29
### Non-applicability of statute of limitations

The crimes within the jurisdiction of the Court shall not be subj to any statute of limitations.

### Article 30
### Mental element

1. Unless otherwise provided, a person shall be criminal responsible and liable for punishment for a crime within the jurisdictio of the Court only if the material elements are committed with intent an knowledge.

2. For the purposes of this article, a person has intent where:

(*a*) In relation to conduct, that person means to engage in th conduct;

(*b*) In relation to a consequence, that person means to cause tha consequence or is aware that it will occur in the ordinary cours of events.

3. For the purposes of this article, "knowledge" means awarenes that a circumstance exists or a consequence will occur in the ordinar course of events. "Know" and "knowingly" shall be construe accordingly.

### Article 31
### Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibilit provided for in this Statute, a person shall not be criminally responsibl if, at the time of that peron's conduct:

(*a*) The person suffers from a mental disease or defect that destroy that person's capacity to appreciate the unlawfulness or natur of his or her conduct, or capacity to control his or her conduc to conform to the requirements of law;

(*b*) The person is in a state of intoxication that destroys that person' capacity to appreciate the unlawfulness or nature of his or he conduct, or capacity to control his or her conduct to conform t the requirements of law, unless the person has become voluntaril intoxicated under such circumtances that the person knew, o disregarded the risk, that, as a result of the intoxication, he o she was likely to engage in conduct constituting a crime withi the jurisdiction of the Court;

(*c*) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;

(*d*) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

(*i*) Made by other persons, or

(*ii*) Constituted by other circumstances beyond that person's control.

2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.

3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

## Article 32
## Mistake of fact or mistake of law

1. A mistake of fact sall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.

2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.

### Article 33
### Superior orders and prescription of law

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

(*a*) The person was under a legal obligation to obey orders of the Government or the superior in question;

(*b*) The person did not know that the order was unlawful; and

(*c*) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

## PART 4. COMPOSITION AND ADMINISTRATION OF THE COURT

### Article 34
### Organs of the Court

The Court shall be composed of the following organs:

(*a*) The Presidency;

(*b*) An Appeals Division, a Trial Division and a Pre-Trial Division;

(*c*) The Office of the Prosecutor;

(*d*) The Registry.

### Article 35
### Service of Judges

1. All judges shall be elected as full-time members of the Court and shall be available to serve on that basis from the commencement of their terms of office.

2. The judges composing the Presidency shall serve on a full-time basis as soon as they are elected.

3. The Presidency may, on the basis of the workload of the Court and in consultation with its members, decide from time to time to what extent the remaining judges shall be required to serve on a full-time basis. Any such arrangement shall be without prejudice to the provisions of article 40.

4. The financial arrangemens for judges not required to serve on a full-time basis shall be made in accordance with article 49.

## Article 36
## Qualifications, nomination and election of judges

1. Subject to the povisions of paragraph 2, there shall be 18 judges of the Court.

2. (*a*) The Presidency, acting on behalf of the Court, may propose an increase in the number of judges specified in paragraph 1, indicating the reasons why this is considered necessary and appropriate. The Registrar shall promptly circulate any such proposal to all States Parties.

(*b*) Any such proposal shall then be considered at a meeting of the Assembly of States Parties to be convened in accordance with article 112. The proposal shall be considered adopted if approved at the meeting by a vote of two-thirds of the members of the Assembly of States Parties and shall enter into force at such time as decided by the Assembly of States Parties.

(*c*) (*i*) Once a proposal for an increase in the number of judges has been adopted under subparagraph (b), the elecion of the additional judges shall take place at the next session of the Assembly of States Parties in accordance with paragraphs 3 to 8 inclusive, and article 37, paragraph 2;

(*ii*) Once a proposal for an increase in the number of judges has been adopted and brought into effect under subparagraphs (*b*) and (*c*) (*i*), it shall be open to the Presidency at any time thereafter, if the workload of the Court justifies it, to propose a reduction in the number of judges, provided that the number of judges shall not be reduced below that specified in paragraph 1. The proposal shall be dealt with in accordance with the procedure laid down in subparagraphs (*a*) and (*b*). In the event that the proposal is adopted, the number of judges shall be progressively decreased as the terms of office of serving judges expire, until the necessary number has been reached.

3. (*a*) The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.

(*b*) Every candidate for election to the Court shall:

(*i*) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or

(*ii*) Have established competence in relevant areas of international law such as international humanitarian law and the law of human

rights, extensive experience in a professional legal capaci which is of relevance to the judicial work of the Court;

(*c*) Every candidate for election to the Court shall have an excelle knowledge of and be fluent in at least one of the workin languages of the Court.

4 (*a*). Nominations of candidates for election to the Court may b made by any State Party to this Statute, and shall be made either:

(*i*) By the procedure for the nomination of candidates for appointmen to the highest judicial offices in the State in question; or

(*ii*) By the procedure provided for the nomination of candidates fo the International Court of Justice in the Statute of that Court.

Nominations shall be accompanied by a statement in the necessary details specifying how the candidate fulfils the requirements of paragraph 3.

(*b*) Each State Party may put forward one candidate for any given election who need not necessarily be a national of that State Party but shall in any case be a national of a State Party.

(*c*) The Assembly of States Parties may decide to establish, if appropriate, an Advisory Committee on nominations. In that event, the Committee's composition and mandate shall be established by the Assembly of States Parties.

5. For the purposes of the election, there shall be two lists of candidates.

List A containing the names of candidates with the qualifications specified in paragraph 3(*b*) (*i*); and

List B containing the names of candidates with the qualifications specified in paragraph 3(*b*) (*ii*).

A candidate with sufficient qualifications for both lists may choose on which list to appear. At the first election to the Court, at least nine judges shall be elected from list A and at least five judges from list B. Subsequent elections shall be so organized as to maintain the equivalent proportion on the Court of judges qualified on the two lists.

6. (*a*) The judges shall be elected by secret ballot at a meeting of the Assembly of States Parties convened for that purpose under article 112. Subject to paragraph 7, the persons elected to the Court shall be the 18 candidates who obtain the highest number of votes and a two-thirds majority of the States Parties present and voting.

(*b*) In the event that a sufficient number of judges is not elected on the first ballot, successive ballots shall be held in accordance with the procedures laid down in subparagraph (a) until the remaining places have been filled.

7. No two judges may be nationals of the same State. A person who, for the purposes of membership in the Court, could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.

8. (*a*) The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for:

(*i*) The representation of the principal legal systems of the world;

(*ii*) Equitable geographical representation; and

(*iii*) A fair representation of female and male judges.

(*b*) States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children.

9. (*a*) Subject to subparagraph (b), judges shall hold office for a term of nine years and, subject to subparagraph (c) and to article 37, paragraph 2, shall not be eligible for re-election.

(*b*) At the first election, one third of the judges elected shall be selected by lot to serve for a term of three years; one third of the judges elected shall be selected by lot to serve for a term of six years; and the remainder shall serve for a term of nine years.

(*c*) A judge who is selected to serve for a term of three years under subparagraph (b) shall be eligible for re-election for a full term.

10. Notwithstanding paragraph 9, a judge assigned to a Trial or Appeals Chamber in accordance with article 39 shall continue in office to complete any trial or appeal the hearing of which has already commenced before the Chamber.

**Article 37**
**Judicial vacancies**

1. In the event of a vacancy, an election shall be held in accordance with article 36 to fill the vacancy.

2. A judge elected to fill a vacancy shall serve for the remainder of the predecessor's term and, if that period is three years or less, shall be eligible for re-election for a full term under article 36.

**Article 38**
**The Presidency**

1. The President and the First and Second Vice-Presidents shall be elected by an absolute majority of the judges. They shall each serve for a term of three years or until the end of their respective terms of office

as judges, whichever expires earlier. They shall be eligible for re-election once.

2. The First Vice-President shall act in place of the President in the event that the President is unavailable or disqualified. The Second Vice-President shall act in place of the President in the event that both the President and the First Vice-President are unavailable or disqualified.

3. The President, together with the First and Second Vice-Presidents, shall constitute the Presidency, which shall be responsible for:

(*a*) The proper administration of the Court, with the exception of the Office of the Prosecutor; and

(*b*) The other functions conferred upon it in accordance with this Statute.

4. In discharging its responsibility under paragraph 3(a), the Presidency shall coordinate with and seek the concurrence of the Prosecutor on all matters of mutual concern.

**Article 39**
**Chambers**

1. As soon as possible after the election of the judges, the Court shall organize itself into the divisions specified in article 34, paragraph (b). The Appeals Division shall be composed of the President and four other judges, the Trial Division of not less than six judges and the Pre-Trial Division of not less than six judges. The assignment of judges to divisions shall be based on the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court, in such a way that each division shall contain an appropriate combination of expertise in criminal law and procedure and in international law. The Trial and Pre-Trial Divisions shall be composed predominantly of judges with criminal trial experience.

2. (*a*) The judicial functions of the Court shall be carried out in each division by Chambers.

(*b*) (*i*) The Appeals Chamber shall be composed of all the judges of the Appeals Division;

(*ii*) The functions of the Trial Chamber shall be carried out by three judges of the Trial Division;

(*iii*) The functions of the Pre-Trial Chamber shall be carried out either by three judges of the Pre-Trial Division or by a single judge of that division in accordance with this Statute and the Rules of Procedure and Evidence;

(c) Nothing in this paragraph shall preclude the simultaneous constitution of more than one Trial Chamber or Pre-Trial Chamber when the efficient management of the Court's workload so requires.

3.(a) Judges assigned to the Trial and Pre-Trial Divisions shall serve in those divisions for a period of three years, and thereafter until the completion of any case the hearing of which has already commenced in the division concerned.

(b) Judges assigned to the Appeals Division shall serve in that division for their entire term of office.

4. Judges assigned to the Appeals Division shall serve only in that division. Nothing in this article shall, however, preclude the temporary attachment of judges from the Trial Division to the Pre-Trial Division or vice versa, if the Presidency considers that the efficient management of the Court's workload so requires, provided that under no circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case.

**Article 40**
**Independence of the judges**

1. The judges shall be independent in the performance of their functions.

2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.

3. Judges required to serve on a full-time basis at the seat of the Court shall not engage in any other occupation of a professional nature.

4. Any question regarding the application of paragraphs 2 and 3 shall be decided by an absolute majority of the judges. Where any such question concerns an individual judge, that judge shall not take part in the decision.

**Article 41**
**Excusing and disqualification of the judges**

1. The Presidency may, at the request of a judge, excuse that judge from the exercise of a function under this Statute, in accordance with the Rules of Procedure and Evidence.

2. *(a)* A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. A judge shall be disqualified from a case in accordance with this paragraph if, *inter alia*, that judge has previously been involved in any capacity in that

case before the Court in a related criminal case at the national level involving the person being investigated or prosecuted. A judge shall also be disqualified on such other grounds as may be provided for in the Rules of Procedure and Evidence.

(*b*) The Prosecutor or the person being investigated or prosecuted may request the disqualification of a judge under this paragraph.

(*c*) Any question as to the disqualification of a judge shall be decided by an absolute majority of the judges. The challenged judge shall be entitled to present his or her comments on the matter, but shall not take part in the decision.

## Article 42
## The Office of the Prosecutor

1. The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not seek or act on instructions from any external source.

2. The Office shall be headed by the Prosecutor. The Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof. The Prosecutor shall be assisted by one or more Deputy Prosecutors, who shall be entitled to carry out any of the acts required of the Prosecutor under this Statute. The Prosecutor and the Deputy Prosecutors shall be of different nationalities. They shall serve on a full-time basis.

3. The Prosecutor and the Deputy Prosecutor shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases. They shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. The Prosecutor shall be elected by secret ballot by an absolute majority of the members of the Assembly of States Parties. The Deputy Prosecutors shall be elected in the same way from a list of candidates provided by the Prosecutor. The Prosecutor shall nominate three candidates for each position of Deputy Prosecutor to be filled. Unless a shorter term is decided upon at the time of their election, the Prosecutor and the Deputy Prosecutors shall hold office for a term of nine years and shall not be eligible for re-election.

5. Neither the Prosecutor nor a Deputy Prosecutor shall engage in any activity which is likely to interfere with his or her prosecutorial

nctions or to affect confidence in his or her independence. They shall ot engage in any other occupation of a professional nature.

6. The Presidency may excuse the Prosecutor or a Deputy Prosecutor, his or her request, from acting in a particular case.

7. Neither the Prosecutor nor a Deputy Prosecutor shall participate any matter in which their impartiality might reasonably be doubted n any ground. They shall be disqualified from a case in accordance ith this paragraph if, *inter alia*, they have previously been involved in ny capacity in that case before the Court or in a related criminal case the national level involving the person being investigated or rosecuted.

8. Any question as to the disqualification of the Prosecutor or a eputy Prosecutor shall be decided by the Appeals Chamber.

(*a*) The person being investigated or prosecuted may at any time request the disqualification of the Prosecutor or a Deputy Prosecutor on the grounds set out in this article;

(*b*) The Prosecutor or the Deputy Prosecutor, as appropriate, shall be entitled to present his or her comments on the matter;

9. The Prosecutor shall appoint advisers with legal expertise on ecific issues, including, but not limited to, sexual and gender violence d violence against children.

**Article 43**
**The Registry**

1. The Registry shall be responsible for the non-judicial aspects of e administration and servicing of the Court, without prejudice to the nctions and powers of the Prosecutor in accordance with article 42.

2. The Registry shall be headed by the Registrar, who shall be the incipal administrative officer of the Court. The Registrar shall exercise s or her functions under the authority of the President of the Court.

3. The Registrar and the Deputy Registrar shall be persons of high oral character, be highly competent and have an excellent knowledge and be fluent in at least one of the working languages of the Court.

4. The judges shall elect the Registrar by an absolute majority by cret ballot, taking into account any recommendation by the Assembly States Parties. If the need arises and upon the recommendation of the egistrar, the judges shall elect, in the same manner, a Deputy Registrar.

5. The Registrar shall hold office for a term of five years, shall be gible for re-election once and shall serve on a full-time basis. The eputy Registrar shall hold office for a term of five years or such shorter

term as may be decided upon by an absolute majority of the judge and may be elected on the basis that the Deputy Registrar shall be calle upon to serve as required.

6. The Registrar shall set up a Victims and Witnesses Unit withi the Registry. This Unit shall provide, in consultation with the Office o the Prosecutor, protective measures and security arrangements counselling and other appropriate assistance for witnesses, victims wh appear before the Court and others who are at risk on account o testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexua violence.

**Article 44**
**Staff**

1. The Prosecutor and the Registrar shall appoint such qualified staff as may be required to their respective offices. In the case of the Prosecutor, this shall include the appointment of investigators.

2. In the employment of staff, the Prosecutor and the Registrar shall ensure the highest standards of efficiency, competency and integrity, and shall have regard, *mutatis mutandis*, to the criteria set forth in article 36, paragraph 8.

3. The Registrar, with the agreement of the Presidency and the Prosecutor, shall propose Staff Regulations which include the terms and conditions upon which the staff of the Court shall be appointed, remunerated and dismissed. The Staff Regulations shall be approved by the Assembly of States Parties.

4. The Court may, in exceptional circumstances, employ the expertise of *gratis* personnel offered by States Parties, intergovernmental organizations or non-governmental organizations to assist with the work of any of the organs of the Court. The Prosecutor may accept any such offer on behalf of the Office of the Prosecutor. Such *gratis* personnel shall be employed in accordance with guidelines to be established by the Assembly of States Parties.

**Article 45**
**Solemn undertaking**

Before taking up their respective duties under this Statute, the judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall each make a solemn undertaking in open court to exercise his or her respective functions impartially and conscientiously.

### Article 46
### Removal from office

1. A judge, the Prosecutor, the Registrar or the Deputy Registrar shall be removed from office if a decision to this effect is made in accordance with paragraph 2, in cases where that person:

(*a*) Is found to have committed serious misconduct or a serious breach of his or her duties under this Statute, as provided for in the Rules of Procedure and Evidence; or

(*b*) Is unable to exercise the functions required by this Statute.

2. A decision as to the removal from office of a judge, the Prosecutor or a Deputy Prosecutor under paragraph 1 shall be made by the Assembly of States Parties, by secret ballot:

(*a*) In the case of a judge, by a two-thirds majority of the States Parties upon a recommendation adopted by a two-thirds majority of the other judges;

(*b*) In the case of the Prosecutor, by an absolute majority of the States Parties;

(*c*) In the case of a Deputy Prosecutor, by an absolute majority of the States Parties upon the recommendations of the Prosecutor.

3. A decision as to the removal from office of the Registrar or Deputy Registrar shall be made by an absolute majority of the judges.

4. A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar whose conduct or ability to exercise the functions of the office as required by this Statute is challenged under this article shall have full opportunity to present and receive evidence and to make submissions in accordance with the Rules of Procedure and Evidence. The person in question shall not otherwise participate in the consideration of the matter.

### Article 47
### Disciplinary measures

A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar who has committed misconduct of a less serious nature than that set out in article 46, paragraph 1, shall be subject to disciplinary measures, in accordance with the Rules of Procedure and Evidence.

### Article 48
### Privileges and immunities

1. The Court shall enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfilment of its

purposes.

2. The judges, the Prosecutor, the Deputy Prosecutors and the Registrar shall, when engaged on or with respect to the business of the Court, enjoy the same privileges and immunities as are accorded to heads of diplomatic missions and shall, after the expiry of their terms of office, continue to be accorded immunity from legal process of every kind in respect of words spoken or written and acts performed by them in their official capacity.

3. The Deputy Registrar, the staff of the Office of the Prosecutor and the staff of the Registry shall enjoy the privileges and immunities and facilities necessary for the performance of their functions, in accordance with the agreement on the privileges and immunities of the Court.

4. Counsel, experts, witnesses or any other person required to be present at the seat of the Court shall be accorded such treatment as is necessary for the proper functioning of the Court, in accordance with the agreement on the privileges and immunities of the Court.

5. The privileges and immunities of:

(*a*) A judge or the Prosecutor may be waived by an absolute majority of the judges;

(*b*) The Registrar may be waived by the Presidency;

(*c*) The Deputy Prosecutors and staff of the Office of the Prosecutor may be waived by the Prosecutor;

(*d*) The Deputy Registrar and staff of the Registry may be waived by the Registrar.

**Article 49**
**Salaries, allowances and expenses**

The judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall receive such salaries, allowances and expenses as may be decided upon by the Assembly of States Parties. These salaries and allowances shall not be reduced during their terms of office.

**Article 50**
**Official and working languages**

1. The official languages of the Court shall be Arabic, Chinese, English, French, Russian and Spanish. The judgments of the Court, as well as other decisions resolving fundamental issues before the Court, shall be published in the official languages. The Presidency shall, in

accordance with the criteria established by the Rules of Procedure and Evidence, determine which decisions may be considered as resolving fundamental issues for the purposes of this paragraph.

2. The working languages of the Court shall be English and French. The Rules of Procedure and Evidence shall determine the cases in which other official languages may be used as working languages.

3. At the request of any party to a proceeding or a State allowed to intervene in a proceeding, the Court shall authorize a language other than English or French to be used by such a party or State, provided that the Court considers such authorization to be adequately justified.

**Article 51**
**Rules of Procedure and Evidence**

1. The Rules of Procedure and Evidence shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

2. Amendments to the Rules of Procedure and Evidence may be proposed by:

(*a*) Any State Party;

(*b*) The judges acting by an absolute majority; or

(*c*) The Prosecutor.

Such amendments shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

3. After the adoption of the Rules of Procedure and Evidence, in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties.

4. The Rules of Procedure and Evidence, amendments thereto and any provisional Rules shall be consistent with this Statute. Amendments to the Rules of Procedure and Evidence as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted.

5. In the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail.

**Article 52**
**Regulations of the Court**

1. The judges shall, in accordance with this Statute and the Rules of Procedure and Evidence, adopt, by an absolute majority, the Regulations

of the Court necessary for its routine functioning.

2. The Prosecutor and the Registrar shall be consulted in th elaboration of the Regulations and any amendments thereto.

3. The Regulations and any amendments thereto shall take effec upon adoption unless otherwise decided by the judges. Immediatel upon adoption, they shall be circulated to States Parties for comments If within six months there are no objections from a majority of States Parties, they shall remain in force.

## PART 5. INVESTIGATION AND PROSECUTION

### Article 53
### Initiation of an investigation

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

(*a*) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;

(*b*) The case is or would be admissible under article 17; and

(*c*) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:

(*a*) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;

(*b*) The case is inadmissible under article 17; or

(*c*) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime;

The Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case,

under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.

3. (*a*) At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.

(*b*) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1(c) or 2(c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.

4. The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or infomation.

### Article 54
### Duties and powers of the Prosecutor with respect to investigations

1. The Prosecutor shall:

(*a*) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally;

(*b*) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children; and

(*c*) Fully respect the rights of persons arising under this Statute.

2. The Prosecutor may conduct investigations on the territory of a State:

(*a*) In accordance with the provisions of Part 9; or

(*b*) As authorized by the Pre-Trial Chamber under article 57, paragraph 3(d).

3. The Prosecutor may:

(*a*) Collect and examine evidence;

(*b*) Request the presence of and question persons being investigated, victims and witnesses;

(*c*) Seek the cooperation of any State or intergovernmenta organization or arrangement in accordance with its respectiv competence and/or mandate;

(*d*) Enter into such arrangements or agreements, not inconsisten with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person;

(*e*) Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and

(*f*) Take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.

**Article 55**
**Rights of persons during an investigation**

1. In respect of an investigation under this Statute, a person:

(*a*) Shall not be compelled to incriminate himself or herself or to confess guilt;

(*b*) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment, and

(*c*) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirement of fairness;

(*d*) Shall not be subjected to arbitrary arrest or detention; and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in the Statute.

2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9 of this Statute, that person shall also have the following rights of which he or she shall be informed prior to being questioned:

(*a*) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;

(*b*) To remain silent, without such silence being a consideration in the determination of guilt or innocence;

(*c*) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it;

(*d*) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

**Article 56**
**Role of the Pre-Trial Chamber in relation to a unique investigative opportunity**

1.(*a*) Where the Prosecutor considers an investigation to present a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial, the Prosecutor shall so inform the Pre-Trial Chamber.

(*b*) In that case, the Pre-Trial Chamber may, upon request of the Prosecutor, take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence.

(*c*) Unless the Pre-Trial Chamber orders otherwise, the Prosecutor shall provide the relevant information to the person who has been arrested or appeared in response to a summons in connection with the investigation referred to in subparagraph (a), in order that he or she may be heard on the matter.

2. The measures referred to in paragraph 1(*b*) may include:

(*a*) Making recommendations or orders regarding procedures to be followed;

(*b*) Directing that a record be made of the proceedings;

(*c*) Appointing an expert to assist;

(*d*) Authorizing counsel for a person who has been arrested, or appeared before the Court in response to a summons, to participate, or where there has not yet been such an arrest or appearance or counsel has not been designated, appointing another counsel to attend and represent the interests of the defence;

(*e*) Naming one of its members or, if necessary, another available judge of the Pre Trial or Trial Division to observe and make

recommendations or orders regarding the collection and preservation of evidence and the questioning of persons;

(*f*) Taking such other action as may be necessary to collect or preserve evidence.

3. (*a*) Where the Prosecutor has not sought measures pursuant to this article but the Pre-Trial Chamber considers that such measures are required to preserve evidence that it deems would be essential for the defence at trial, it shall consult with the Prosecutor as to whether there is good reason for the Prosecutor's failure to request the measures. If upon consultation, the Pre-Trial Chamber concludes that the Prosecutor's failure to request such measures is unjustified, the Pre-Trial Chamber may take such measures on its own initiative.

(*b*) A decision of the Pre-Trial Chamber to act on its own initiative under this paragraph may be appealed by the Prosecutor. The appeal shall be heard on an expedited basis.

4. The admissibility of evidence preserved or collected for trial pursuant to this article, or the record thereof, shall be governed at trial by article 69, and given such weight as determined by the Trial Chamber.

## Article 57
## Functions and powers of the Pre-Trial Chamber

1. Unless otherwise provided for in this Statute, the Pre-Trial Chamber shall exercise its functions in accordance with the provisions of this article.

2. (*a*) Orders or rulings of the Pre-Trial Chamber issued under articles 15, 18, 19, 54, paragraph 2, 61, paragraph 7 and 72 must be concurred in by a majority of its judges.

(*b*) In all other cases, a single judge of the Pre-Trial Chamber may exercise the functions provided for in this Statute, unless otherwise provided for in the Rules of Procedure and Evidence or by a majority of the Pre-Trial Chamber.

3. In addition to its other functions under this Statute, the Pre-Trial Chamber may:

(*a*) At the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation;

(*b*) Upon the request of a person who has been arrested or has appeared pursuant to a summons under article 58, issue such orders, including measures such as those described in article 56, or seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence;

(*c*) Where necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information;

(*d*) Authorize the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the cooperation of that State under Part 9 if, whenever possible having regard to the views of the State concerned, the Pre-Trial Chamber has determined in that case that the State is clearly unable to execute a request for cooperation due to the availability of any authority or any component of its judicial system competent to execute the request for cooperation under Part 9.

(*c*) Where a warrant of arrest or a summons has been issued under article 58, and having due regard to the strength of the evidence and the rights of the parties concerned, as provided for in this Statute and the Rules of Procedure and Evidence, seek the cooperation of States pursuant to article 93, paragraph 1(j), to take protective measures for the purpose of forfeiture in particular for the ultimate benefit of victims.

**Article 58**
**Issuance by the Pre-Trial Chamber of a warrant of arrest or summons to appear**

1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:

(*a*) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and

(*b*) The arrest of the person appears necessary:

(*i*) To ensure the person's appearance at trial;

(*ii*) To ensure that the person does not obstruct or endanger the investigation or the court proceedings, or

(*iii*) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

2. The application of the Prosecutor shall contain:

(*a*) The name of the person and any other relevant identifying information;

(*b*) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed;

(*c*) A concise statement of the facts which are alleged to constitute those crimes;

(*d*) A summary of the evidence and any other information which establish reasonable grounds to believe that the person committed those crimes; and

(*e*) The reason why the Prosecutor believes that the arrest of the person is necessary.

3. The warrant of arrest shall contain:

(*a*) The name of the person and any other relevant identifying information;

(*b*) A specific reference to the crimes within the jurisdiction of the Court for which the person's arrest is sought; and

(*c*) A concise statement of the facts which are alleged to constitute those crimes.

4. The warrant of arrest shall remain in effect until otherwise ordered by the Court.

5. On the basis of the warrant of arrest, the Court may request the provisional arrest or the arrest and surrender of the person under Part 9.

6. The Prosecutor may request the Pre-Trial Chamber to amend the warrant of arrest by modifying or adding to the crimes specified therein. The Pre-Trial Chamber shall so amend the warrant if it is satisfied that there are reasonable grounds to believe that the person committed the modified or additional crimes.

7. As an alternative to seeking a warrant of arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance, it shall issue the summons, with or without conditions restricting liberty (other than detention) if provided for by national law, for the person to appear. The summons shall contain:

(*a*) The name of the person and any other relevant identifying information;

(*b*) The specified date on which the person is to appear;

(*c*) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed; and

(*d*) A concise statement of the facts which are alleged to constitute the crime. The summons shall be served on the person.

**Article 59**
**Arrest proceedings in the custodial State**

1. A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9.

2. A person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that:

(*a*) The warrant applies to that person;

(*b*) The person has been arrested in accordance with the proper process; and

(*c*) The person's rights have been respected.

3. The person arrested shall have the right to apply to the competent authority in the custodial State for interim release pending surrender.

4. In reaching a decision on any such application, the competent authority in the custodial State shall consider whether, given the gravity of the alleged crimes, there are urgent and exceptional circumstances to justify interim release and whether necessary safeguards exist to ensure that the custodial State can fulfil its duty to surrender the person to the Court. It shall not be open to the competent authority of the custodial State to consider whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1(a) and (b).

5. The Pre-Trial Chamber shall be notified of any request for interim release and shall make recommendations to the competent authroity in the custodial State. The competent authority in the custodial state shall give full consideration to such recommendations, including any recommendations on measures to prevent the escape of the person, before rendering its decision.

6. If the person is granted interim release, the Pre-Trial Chamber may request periodic reports on the status of the interim release.

7. Once ordered to be surrendered by the custodial State, the person shall be delivered to the Court as soon as possible.

**Article 60**
**Initial proceedings before the Court**

1. Upon the surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed, and of his

or her rights under this Statute, including the right to apply for interim release pending trial.

2. A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions.

3. The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.

4. The Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing the person, with or without conditions.

5. If necessary, the Pre-Trial Chamber may issue a warrant of arrest to secure the presence of a person who has been released.

## Article 61
## Confirmation of the charges before trial

1. Subject to the provisions of paragraph 2, within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. The hearing shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel.

2. The Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has:

(*a*) Waived his or her right to be present; or

(*b*) Fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held.

In that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice.

3. Within a reasonable time before the hearing, the person shall:

(*a*) Be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial; and

(*b*) Be informed of the evidence on which the Prosecutor intends to rely at the hearing.

The Pre-Trial Chamber may issue orders regarding the disclosure of information for the purposes of the hearing.

4. Before the hearing, the Prosecutor may continue the investigation and may amend or withdraw any charges. The person shall be given reasonable notice before the hearing of any amendment to or withdrawal of charges. In case of a withdrawal of charges, the Prosecutor shall notify the Pre-Trial Chamber of the reasons for the withdrawal.

5. At the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.

6. At the hearing, the person may:

(*a*) Object to the charges;

(*b*) Challenge the evidence presented by the Prosecutor; and

(*c*) Present evidence.

7. The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall:

(*a*) Confirm those charges in relation to which it has determined that there is sufficient evidence; and commit the person to a Trial Chamber for trial on the charges as confirmed;

(*b*) Decline to confirm those chages in relation to which it has determined that there is insufficient evidence;

(*c*) Adjourn the hearing and request the Prosecutor to consider:

(*i*) Providing further evidence or conducting further investigation with respect to a particular charge; or

(*ii*) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.

8. Where the Pre-Trial Chamber declines to confirm a charge, the Prosecutor shall not be precluded from subsequently requesting its confirmation if the request is supported by additional evidence.

9. After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.

10. Any warrant previously issued shall cease to have effect with respect to any charges which have not been confirmed by the Pre-Trial Chamber or which have been withdrawn by the Prosecutor.

11. Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which, subject to paragraph 8 and to article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exerise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings.

## PART 6. THE TRIAL

### Article 62
### Place of trial

Unless otherwise decided, the place of the trial shall be the seat of the Court.

### Article 63
### Trial in the presence of the accused

1. The accused shall be present during the trial.

2. If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration is strictly required.

### Article 64
### Functions and powers of the Trial Chambers

1. The functions and powers of the Trial Chambers set out in this article shall be exercised in accordance with this Statue and the Rules of Procedure and Evidence.

2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

3. Upon assignment of a case for trial in accordance with this Statue, the Trial Chamber assigned to deal with the case shall:

(*a*) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings;

(*b*) Determine the language or languages to be used at trial; and

(*c*) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.

4. The Trial Chamber may, if necessary for its effective and fair functioning, refer preliminary issues to the Pre-Trial Chamber or, if necessary, to another available judge of the Pre-Trial Division.

5. Upon notice to the parties, the Trial Chamber may, as appropriate, direct that there be joinder or severance in respect of charges against more than one accused.

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:

(*a*) Exercise any functions of the Pre-Trial Chamber referred to in article 61, paragraph 11;

(*b*) Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute;

(*c*) Provide for the protection of confidential information;

(*d*) Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the Parties;

(*e*) Provide for the protection of the accused, witnesses and victims; and

(*f*) Rule on any other relevant matters.

7. The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence.

8. (*a*) At the commencement of the trial, the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-

Trial Chamber. The Trial Chamber shall satisfy itself that the accused understands the nature of the charges. It shall afford him or her the opportunity to make an admission of guilt in accordance with article 65 or to plead not guilty.

(*b*) At the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner. Subject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute.

9. The Trial Chambers shall have, *inter alia*, the power on applications of a party or on its own motion to:

(*a*) Rule on the admissibility or relevance of evidence; and

(*b*) Take all necessary steps to maintain order in the course of a hearing.

10. The Trial Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is made and that it is maintained and preserved by the Registrar.

## Article 65
## Proceedings on an admission of guilt

1. Where the accused makes an admission of guilt pursuant to article 64, paragraph 8(*a*), the Trial Chamber shall determine whether:

(*a*) The accused understands the nature and consequences of the admission of guilt;

(*b*) The admission is voluntarily made by the accused after sufficient consultation with defence counsel; and

(*c*) The admission of guilt is supported by the facts of the case that are contained in:

(*i*) The charges brought by the Prosecutor and admitted by the accused;

(*ii*) Any materials presented by the Prosecutor which supplement the charges and which the accused accepts; and

(*iii*) Any other evidence, such as the testimony of witnesses, presented by the Prosecutor or the accused.

2. Where the Trial Chamber is satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt, together with any additional evidence presented, as establishing all the essential facts that are required to prove the crime to which the admission of guilt relates, and may convict the accused of that crime.

3. Where the Trial Chamber is not satisifed that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt as not having been made, in which case it shall order that the trial be continued under the ordinary trial procedures provided by this Statute and may remit the case to another Trial Chamber.

4. Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice, in particular the interests of the victims, the Trial Chamber may:

(*a*) Request the Prosecutor to present additional evidence, including the testimony of witnesses; or

(*b*) Order that the trial be continued under the ordinary trial procedures provided by this Statute, in which case it shall consider the admission of guilt as not having been made and may remit the case to another Trial Chamber.

5. Any discussions between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court.

**Article 66**
**Presumption of innocence**

1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.

2. The onus is on the Prosecutor to prove the guilt of the accused.

3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

**Article 67**
**Rights of the accused**

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

(*a*) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;

(*b*) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

(*c*) To be tried without undue delay;

(*d*) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;

(*e*) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;

(*f*) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks;

(*g*) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;

(*h*) To make an unsworn oral or written statement in his or her defence; and

(*i*) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

## Article 68
## Protection of the victims and witnesses and their participation in the proceedings

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 2, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against

children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings *in camera* or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6.

5. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

6. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information.

**Article 69**
**Evidence**

1. Before testifying, each witness shall, in accordance with the Rules of Procedure and Evidence, give an undertaking as to the truthfulness of the evidence to be given by that witness.

2. The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of *viva voce* (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.

3. The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

4. The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

5. The Court shall respect and observe privileges on confidentiality as provided for in the Rules of Procedure and Evidence.

6. The Court shall not require proof of facts of common knowledge but may take judicial notice of them.

7. Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

(*a*) The violation casts substantial doubt on the reliability of the evidence; or

(*b*) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

8. When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law.

## Article 70
## Offences against the administration of justice

1. The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally:

(*a*) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;

(*b*) Presenting evidence that the party knows is false or forged;

(*c*) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliation against a

witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;

(*d*) Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform improperly, his or her duties;

(*e*) Retaliating against an official of the Court on account of duties performed by that or another official;

(*f*) Soliciting or accepting a bribe as an official of the Court in conjunction with his or her official duties.

2. The principles and procedures governing the Court's exercise of jurisdiction over offences under this article shall be those provided for in the Rules of Procedure and Evidence. The conditions for providing international cooperation to the Court with respect to its proceedings under this article shall be governed by the domestic laws of the requested State.

3. In the event of conviction, the Court may impose a term of imprisonment not exceeding five years, or a fine in accordance with the Rules of Procedure and Evidence, or both.

4. (*a*) Each State Party shall extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to offences against the administration of justice referred to in this article, committed on its territory, or by one of its nationals;

(*b*) Upon request by the Court, whenever it deems it proper, the State Party shall submit the case to its competent authorities for the purpose of prosecution. Those authorities shall treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively.

**Article 71**
**Sanctions for misconduct before the Court**

1. The Court may sanction persons present before it who commit misconduct, including disruption of its proceedings or deliberate refusal to comply with its directions, by administration measures other than imprisonment, such as temporary or permanent removal from the courtroom, a fine or other similar measures provided for in the Rules of Procedure and Evidence.

2. The procedures governing the imposition of the measures set forth in paragraph 1 shall be those provided for in the Rules of Procedure and Evidence.

## Article 72
## Protection of national security information

1. This article applies in any case where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests. Such cases include those falling within the scope of article 56, paragraphs 2 and 3, article 61, paragraph 3, article 64, paragraph 3, article 67, paragraph 2, article 68, paragraph 6, article 87, paragraph 6 and article 93, as well as cases arising at any other stage of the proceedings where such disclosure may be at issue.

2. This article shall also apply when a person who has been requested to give information or evidence has refused to do so or has referred the matter to the State on the ground that disclosure would prejudice the national security interests of a State and the State concerned confirms that it is of the opinion that disclosure would prejudice its national security interests.

3. Nothing in this article shall prejudice the requirements of confidentiality applicable under article 54, paragraph 3(e) and (f), or the application of article 73.

4. If a State learns that information or documents of the State are being, or are likely to be, disclosed at any stage of the proceedings, and it is of the opinion that disclosure would prejudice its national security interests, that State shall have the right to intervene in order to obtain resolution of the issue in accodance with this article.

5. If, in the opinion of a State, disclosure of information would prejudice its national security interests, all reasonable steps will be taken by the State, acting in conjunction with the Prosecutor, the Defence or the Pre-Trial Chamber or Trial Chamber, as the case may be, to seek to resolve the matter by cooperative means. Such steps may include:

(*a*) Modification or clarification of the request;

(*b*) A determination by the Court regarding the relevance of the information or evidence sought, or a determination as to whether the evidence, though relevant, could be or has been obtained from a source other than the requested State;

(*c*) Obtaining the information or evidence from a different source or in a different form; or

(*d*) Agreement on conditions under which the assistance could be provided including, among other things, providing summaries or redactions, limitations on disclosure, use of *in camera* or *ex-parte* proceedings, or other protective measures permissible under the Statute and the Rules.

6. Once all reasonable steps have been taken to resolve the matter through cooperative means, and if the State considers that there are no means or conditions under which the information or documents could be provided or disclosed without prejudice to its national security interests, it shall so notify the Prosecutor or the Court of the specific reasons for its decision, unless a specific description of the reasons would itself necessarily result in such prejudice to the State's national security interests.

7. Thereafter, if the Court determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused, the Court may undertake the following actions:

(*a*) Where disclosure of the information or document is sought pursuant to a request for cooperation under Part 9 or the circumstances described in paragraph 2, and the State has invoked the ground for refusal referred to in article 93, paragraph 4:

(*i*) The Court may, before making any conclusion referred to in subparagraph 7(a)(ii), request further consultations for the purpose of considering the State's representations, which may include, as appropriate, hearings in camera and *ex parte*;

(*ii*) If the Court concludes that, by invoking the ground for refusal under article 93, paragraph 4, in the circumstances of the case, the requested State is not acting in accordance with its obligations under the Statute, the Court may refer the matter in accordance with article 87, paragraph 7, specifying the reasons for its conclusion; and

(*iii*) The Court may make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances; or

(*b*) In all other circumstances:

(*i*) Order disclosure; or

(*ii*) To the extent it does not order disclosure, make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances.

**Article 73**
**Third-Party information or documents**

If a State Party is requested by the Court to provide a document or information in its custody, possession or control, which was disclosed to it in confidence by a State, intergovernmental organization or

international organization, it shall seek the consent of the originator to disclose that document or information. If the originator is a State Party, it shall either consent to disclosure of the information or document or undertake to resolve the issue of disclosure with the Court, subject to the provisions of article 72. If the originator is not a State Party and refuses consent to disclosure, the requested State shall inform the Court that it is unable to provide the document or information because of a pre-existing obligation of confidentiality to the originator.

## Article 74
## Requirements for the decision

1. All the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations. The Presidency may, on a case-by-case basis, designate, as available, one or more alternate judges to be present at each stage of the trial and to replace a member of the Trial Chamber if that member is unable to continue attending.

2. The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.

3. The jugdes shall attempt to achieve unanimity in their decision, failing which the decision shall be taken by a majority of the judges.

4. The deliberations of the Trial Chamber shall remain secret.

5. The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions. The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority. The decision or a summary thereof shall be delivered in open court.

## Article 75
## Reparations to victims

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.

4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.

5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.

6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

**Article 76**
**Sentencing**

1. In the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence.

2. Except where article 65 applies and before the completion of the trial, the Trial Chamber may on its own motion and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence, in accordance with the Rules of Procedure and Evidence.

3. Where paragraph 2 applies, any representations under article 75 shall be heard during the further hearing referred to in paragraph 2 and, if necessary, during any additional hearing.

4. The sentence shall be pronounced in public and, wherever possible, in the presence of the accused.

## PART 7. PENALTIES

### Article 77
### Applicable penalties

1. Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime under article 5 of this Statute:

(*a*) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or

(*b*) A term of life imprisonment when justified by the extreme gravity of the crime and the inidvidual circumstances of the convicted person.

2. In addition to imprisonment, the Court may order:

(*a*) A fine under the criteria provided for in the Rules of Procedure and Evidence;

(*b*) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, withour prejudice to the rights of bona fide third parties.

### Article 78
### Determination of the sentence

1. In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.

2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.

3. When a peson has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years' imprisonment or a sentence of life imprisonment in conformity with article 77, paragraph 1(*b*).

### Article 79
### Trust Fund

1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction

of the Court, and of the families of such victims.

2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.

3. The Trust Fund shall be managed according to critera to be determined by the Assembly of States Parties.

**Article 80**
**Non-prejudice of national application of penalties and national laws**

Nothing in this Part of the Statute affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part.

## PART 8. APPEAL AND REVISION

**Article 81**
**Appeal against decision of acquittal or conviction or against sentence**

1. A decision under article 74 may be appealed in accordance with the Rules of Procedure and Evidence as follows:

(*a*) The Prosecutor may make an appeal on any of the following grounds:

(*i*) Procedural error,

(*ii*) Error of fact, or

(*iii*) Error of law;

(*b*) The convicted person or the Prosecutor on that person's behalf may make an appeal on any of the following grounds:

(*i*) Procedural error,

(*ii*) Error of fact,

(*iii*) Error of law, or

(*iv*) Any other ground that affects the fairness or reliability of the proceedings or decision.

2.(*a*)A sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor or the convicted person on the ground of disproportion between the crime and the sentence.

(*b*) If on an appeal against sentence the Court considers that there are grounds on which the conviction might be set aside, wholly or in part, it may invite the Prosecuter and the convicted person to submit grounds under article 81, paragraph 1 (a) or (b), and may render a decision on conviction in accordance with article 83.

(*c*) The same procedure applies when the Court, on an appeal against conviction only, considers that there are grounds to reduce the sentence under paragraph 2(a).

3.(*a*) Unless the Trial Chamber orders otherwise, a convicted person shall remain in custody pending an appeal;

(*b*) When a convicted person's time in custody exceeds the sentence of imprisonment imposed, that person shall be released, except that if the Prosecutor is also appealing, the release may be subject to the conditions under subparagraph (c) below;

(*c*) In case of an acquittal, the accused shall be released immediately, subject to the following:

(*i*) Under exceptional circumstances, and having regard, *inter alia*, to the concrete risk of flight, the seriousness of the offence charged and the probability of success on appeal, the Trial Chamber, at the request to the Prosecutor, may maintain the detention of the person pending appeal;

(*ii*) A decision by the Trial Chamber under subparagraph (c)(i) may be appealed in accordance with the Rules of Procedure and Evidence.

4. Subject to the provisions of paragraph 3 (a) and (b), execution of the decision or sentence shall be suspended during the period allowed for appeal and for the duration of the appeal proceedings.

**Article 82**
**Appeal against other decisions**

1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

(*a*) A decision with respect to jurisdiction or admissibility;

(*b*) A decision granting or denying release of the person being investigated or prosecuted;

(*c*) A decision of the Pre-Trial Chmaber to act on its own initiative under article 56, paragraph 3;

(*d*) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

2. A decision of the Pre-Trial Chamber under article 57, paragraph 3(*d*), may be appealed against by the State concerned or by the Prosecutor, with the leave of the Pre-Trial Chamber. The appeal shall be heard on an expedited basis.

3. An appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence.

4. A legal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under Article 73 may appeal against the order for reparations, as provided in the Rules of Procedure and Evidence.

**Article 83**
**Proceedings on appeal**

1. For the purposes of proceedings under article 81 and this article, the Appeals Chamber shall have all the powers of the Trial Chamber.

2. If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may:

(*a*) Reverse or amend the decision or sentence; or

(*b*) Order a new trial before a different Trial Chamber.

For these purposes, the Appeals Chamber may remand a factual issue to the original Trial Chamber for it to determine the issue and to report back accordingly, or may itself call evidence to determine the issue. When the decision or sentence has been appealed only by the person convicted, or the Prosecutor on that person's behalf, it cannot be amended to his or her detriment.

3. If in an appeal against sentence the Appeals Chamber finds that the sentence is disproportionate to the crime, it may vary the sentence in accordance with Part 7.

4. The judgement of the Appeals Chamber shall be taken by a majority of the judges and shall be delivered in open court. The judgment shall state the reasons on which it is based. When there is no unanimity, the judgment of the Appeals Chamber shall contain the views of the

majority and the minority, but a judge may deliver a seperate or dissenting opinion on a question of law.

5. The Appeals Chamber may deliver its judgment in the absence of the person acquitted or convicted.

**Article 84**
**Revision of conviction or sentence**

1. The convicted person or, after death, spouses, children, parents or one person alive at the time of the accused's death who has been given express written instructions from the accused to bring such a claim, or the Prosecutor on the person's behalf, may apply to the Appeals Chamber to revise the final judgment of conviction or sentence on the grounds that:

(*a*) New evidence has been discovered that :

(*i*) Was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and

(*ii*) Is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict;

(*b*) It has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified;

(*c*) One or more of the judges who paricipated in conviction or confirmation of the charges has committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office under article 46.

2. The Appeals Chamber shall reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate:

(*a*) Reconvene the original Trial Chamber;

(*b*) Constitute a new Trial Chamber; or

(*c*) Retain jurisdiction over the matter,

with a view to, after hearing the parties in the manner set forth in the Rules of Procedure and Evidence, arriving at a determination on whether the judgment should be revised.

## Article 85
## Compensation to an arrested or convicted person

1. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

2. When a person has by a final decision been convicted of a criminal offence, and when subsequently his or her conviction has been reversed on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.

3. In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason.

# PART 9. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

## Article 86
## General obligation to cooperate

States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.

## Article 87
## Requests for cooperation: general provisions

1. *(a)* The Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, acceptance, approval or accession.

Subsequent changes to the designation shall be made by each State Party in accordance with the Rules of Procedure and Evidence.

*(b)* When appropriate, without prejudice to the provisions of subparagraph *(a)*, requests may also be transmitted through the International Criminal Police Organization or any appropriate regional organization.

2. Requests for cooperation and any documents supporting th request shall either be in or be accompanied by a translation into a official language of the requested State or in one of the workin languages of the Court, in accordance with the choice made by tha State upon ratification, acceptance, approval or accession.

Subsequent changes to this choice shall be made in accordance with the Rules of Procedure and Evidence.

3. The requested State shall keep confidential a request for cooperation and any documents supporting the request, except to the extent that the disclosure is necessary for execution of the request.

4. In relation to any request for assistance presented under Part 9, the Court may take such measures, including measures related to the protection of information, as may be necessary to ensure the safety or physical or psychological well-being of any victims, potential witnesses and their families. The Court may request that any information that is made available under Part 9 shall be provided and handled in a manner that protects the safety and physical or psychological well-being of any victims, potential witnesses and their families.

5. The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an *ad hoc* arrangement, an agreement with such State or any other appropriate basis.

Where a State not party to this Statute, which has entered into an *ad hoc* arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council.

6. The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate.

7. Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

**Article 88**
**Availability of procedures under national law**

States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part.

**Article 89**
**Surrender of persons to the Court**

1. The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.

2. Where the person sought for surrender brings a challenge before a national court on the basis of the principle of *ne bis in idem* as provided in article 20, the requested State shall immediately consult with the Court to determine if there has been a relevant ruling on admissibility. If the case is admissible, the requested State shall proceed with the execution of the request. If an admissibility ruling is pending, the requested State may postpone the execution of the request for surrender of the person until the Court makes a determination on admissibility.

3.(*a*) A State Party shall authorize, in accordance with its national procedural law, transportation through its territory of a person being surrendered to the Court by another State, except where transit through that State would impede or delay the surrender.

(*b*) A request by the Court for transit shall be transmitted in accordance with article 87. The request for transit shall contain:

(*i*) A description of the person being transported;

(*ii*) A brief statement of the facts of the case and their legal characterization; and

(*iii*) The warrant for arrest and surrender;

(*c*) A person being transported shall be detained in custody during the period of transit;

(*d*) No authorization is required if the person is transported by air and no landing is scheduled on the territory of the transit State;

(*e*) If an unscheduled landing occurs on the territory of the transit State, that State may require a request for transit from the Court

as provided for in subparagraph (*b*). The transit State sha detain the person being transported until the request for trans is received and the transit is effected; provided that detentic for purposes of this subparagraph may not be extended beyor 96 hours from the unscheduled landing unless the request received within that time.

4. If the person sought is being proceeded against or is serving sentence in the requested State for a crime different from that for whic surrender to the Court is sought, the requested State, after making i decision to grant the request, shall consult with the Court.

**Article 90**
**Competing requests**

1. A State Party which receives a request from the Court for th surrender of a person under article 89 shall, if it also receives a reques from any other State for the extradition of the same person for the sam conduct which forms the basis of the crime for which the Court seek the person's surrender, notify the Court and the requesting State of tha fact.

2. Where the requesting State is a State Party, the requested Stat shall give priority to the request from the Court if:

(*a*) The Court has, pursuant to articles 18 and 19, made determination that the case in respect of which surrender i sought is admissible and that determination takes into accoun the investigation or prosecution conducted by the requestin State in respect of its request for extradition; or

(*b*) The Court makes the determination described in subparagrapl (a) pursuant to the requested State's notification unde paragraph 1.

3. Where a determination under paragraph 2(a) has not been made the requested State may, at its discretion, pending the determination o the Court under paragraph 2(b), proceed to deal with the request fo extradition from the requesting State but shall not extradite the perso until the Court has determined that the case is inadmissible. The Court' determination shall be made on an expedited basis.

4. If the requesting State is a State not Party to this Statute th requested State, if it is not under an international obligation to extradit the person to the requesting State, shall give priority to the request fo surrender from the Court, if the Court has determined that the case i admissible.

5. Where a case under paragraph 4 has not been determined to be dmissible by the Court, the requested State may, at its discretion, proceed to deal with the request for extradition from the requesting State.

6. In cases where paragraph 4 applies except that the requested State is under an existing international obligation to extradite the person to the requesting State not Party to this Statute, the requested State shall determine whether to surrender the person to the Court or extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to:

(*a*) The respective dates of the requests;

(*b*) The interests of the requesting State including, where relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought; and

(*c*) The possibility of subsequent surrender between the Court and the requesting State.

7. Where a State Party which receives a request from the Court for the surrender of a person also receives a request from any State for the extradition of the same person for conduct other than that which constitutes the crime for which the Court seeks the person's surrender:

(*a*) The requested State shall, if it is not under an existing international obligation to extradite the person to the requesting State, give priority to the request from the Court;

(*b*) The requested State shall, if it is under an existing international obligation to extradite the person to the requesting State, determine whether to surrender the person to the Court or extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to those set out in paragraph 6, but shall give special consideration to the relative nature and gravity of the conduct in question.

8. Where pursuant to a notification under this article, the Court has determined a case to be inadmissible, and subsequently extradition to the requesting State is refused, the requested State shall notify the Court of this decision.

## Article 91
## Contents of request for arrest and surrender

1. A request for arrest and surrender shall be made in writing. In urgent cases, a request may be made by any medium capable of

delivering a written record, provided that the request shall be confir through the channel provided for in article 87, paragraph 1(a).

2. In the case of a request for the arrest of a person for who warrant of arrest has been issued by the Pre-Trial Chamber under art 58, the request shall contain or be supported by:

(*a*) Information describing the person sought, sufficient to iden the person, and information as to that person's probable locat

(*b*) A copy of the warrant of arrest; and

(c) Such documents, statements or information as may be necess to meet the requirements for the surrender process in requested State, except that those requirements should not more burdensome than those applicable to requests extradition pursuant to treaties or arrangements between requested State and other States and should, if possible, be l burdensome, taking into account the distinct nature of the Co

3. In the case of a request for the arrest and surrender of a pers already convicted, the request shall contain or be supported by:

(*a*) A copy of any warrant of arrest for that person;

(*b*) A copy of the judgment of conviction;

(*c*) Information to demonstrate that the person sought is the c referred to in the judgment of conviction; and

(*d*) If the person sought has been sentenced, a copy of the senter imposed and, in the case of a sentence for imprisonment statement of any time already served and the time remaining be served.

4. Upon the request of the Court, a State Party shall consult with Court, either generally or with respect to a specific matter, regardi any requirements under its national law that may apply under paragra 2(c). During the consultations, the State Party shall advise the Court the specific requirements of its national law.

**Article 92**
**Provisional arrest**

1. In urgent cases, the Court may request the provisional arrest the person sought, pending presentation of the request for surren and the documents supporting the request as specified in article 91.

2. The request for provisional arrest shall be made by any medi capable of delivering a written record and shall contain:

(*a*) Information describing the person sought, sufficient to ident the person, and information as to that person's probable locati

(*b*) A concise statement of the crimes for which the person's arrest is sought and of the facts which are alleged to constitute those crimes, including, where possible, the date and location of the crime;

(*c*) A statement of the existence of a warrant of arrest or a judgment of conviction against the person sought; and

(d) A statement that a request for surrender of the person sought will follow.

3. A person who is provisionally arrested may be released from stody if the requested State has not received the request for surrender d the documents supporting the request as specified in article 91 within time limits specified in the Rules of Procedure and Evidence. wever, the person may consent to surrender before the expiration of s period if permitted by the law of the requested State. In such a se, the requested State shall proceed to surrender the person to the urt as soon as possible.

4. The fact that the person sought has been released from custody rsuant to paragraph 3 shall not prejudice the subsequent arrest and render of that person if the request for surrender and the documents pporting the request are delivered at a later date.

## Article 93
## Other forms of cooperation

1. States Parties shall, in accordance with the provisions of this Part d under procedures of national law, comply with requests by the Court provide the following assistance in relation to investigations or secutions:

(*a*) The identification and whereabouts of persons or the location of items;

(*b*) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;

(*c*) The questioning of any person being investigated or prosecuted;

(*d*) The service of documents, including judicial documents;

(*e*) Facilitating the voluntary appearance of persons as witnesses or experts before the Court;

(*f*) The temporary transfer of persons as provided in paragraph 7;

(*g*) The examination of places or sites, including the exhumation and examination of grave sites;

(*h*) The execution of searches and seizures;

(*i*) The provision of records and documents, including offic records and documents;

(*j*) The protection of victims and witnesses and the preservation evidence;

(*k*) The identification, tracing and freezing or seizure of procee property and assets and instrumentalities of crimes for t purpose of eventual forfeiture, without prejudice to the rights bona fide third parties; and

(*l*) Any other type of assistance which is not prohibited by t law of the requested State, with a view to facilitating t investigation and prosecution of crimes within the jurisdicti of the Court.

2. The Court shall have the authority to provide an assurance to witness or an expert appearing before the Court that he or she will n be prosecuted, detained or subjected to any restriction of person freedom by the Court in respect of any act or omission that precede the departure of that person from the requested State.

3. Where execution of a particular measure of assistance detailed a request presented under paragraph 1, is phohibited in the requeste State on the basis of an existing fundamental legal pronciple of gener application, the requested State shall promptly consult with the Cou to try to resolve the matter. In the consultations, consideration shou be given to whether the assistance can be rendered in another mann or subject to conditions. If after consultations the matter cannot b resolved, the Court shall modify the request as necessary.

4. In accordance with article 72, a State Party may deny a reque for assistance, in whole or in part, only if the request concerns th production of any documents or disclosure of evidence which relat to its national security.

5. Before denying a request for assistance under paragraph 1(1 the requested State shall consider whether the assistance can be provide subject to specified conditions, or whether the assistance can be provide at a later date or in an alternative manner, provided that if the Court the Prosecutor accepts the assistance subject to conditions, the Court the Prosecutor shall abide by them.

6. If a request for assistance is denied, the requested State Par shall promptly inform the Court or the Prosecutor of the reasons f such denial.

7. (*a*) The Court may request the temporary transfer of a person in custody for purposes of identification or for obtaining testimony or other assistance. The person may be transferred if the following conditions are fulfilled:

(*i*) The person freely gives his or her informed consent to the transfer; and

(*ii*) The requested State agrees to the transfer, subject to such conditions as that State and the Court may agree.

(*b*) The person being transferred shall remain in custody. When the purposes of the transfer have been fulfilled, the Court shall return the person without delay to the requested State.

8. (*a*) The Court shall ensure the confidentiality of documents and information, except as required for the investigation and proceedings described in the request.

(*b*) The requested State may, when necessary, transmit documents or information to the Prosecutor on a confidential basis. The Prosecutor may then use them solely for the purpose of generating new evidence;

(*c*) The requested State may, on its own motion or at the request of the Prosecutor, subsequently consent to the disclosure of such documents or information. They may then be used as evidence pursuant to the provisions of Parts 5 and 6 and in accordance with the Rules of Procedure and Evidence.

9.(*a*) (*i*) In the event that a State Party receives competing requests, other than for surrender or extradition, from the Court and from another State pursuant to an international obligation, the State Party shall endeavour, in consultation with the Court and the other State, to meet both requests, if necessary by postponing or attaching conditions to one or the other request.

(*ii*) Failing that, competing requests shall be resolved in accordance with principles established in article 90.

(*b*) Where, however, the request from the Court concerns information, property or persons which are subject to the control of a third State or an international organization by virtue of an international agreement, the requested State shall so inform the Court and the Court shall direct its request to the third State or international organization.

10.(*a*) The Court may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State.

(*b*)(*i*) The assistance provided under subparagraph (a) shall include *inter alia*:

(1) The transmission of statements, documents or other types of evidence obtained in the course of an investigation or a trial conducted by the Court; and

(2) The questioning of any person detained by order of the Court;

(*ii*) In the case of assistance under subparagraph (b)(i)(1):

(1) If the documents or other types of evidence have been obtained with the assistance of a State, such transmission shall require the consent of that State;

(2) If the statements, documents or other types of evidence have been provided by a witness or expert, such transmission shall be subject to the provisions of article 68.

(*c*) The Court may, under the conditions set out in this paragraph, grant a request for assistance under this paragraph from a State which is not a Party to the Statute.

**Article 94**
**Postponement of execution of a request in respect of ongoing investigation or prosecution**

1. If the immediate execution of a request would interfere with an ongoing investigation or prosecution of a case different from that to which the request relates, the requested State may postpone the execution of the request for a period of time agreed upon with the Court. However, the postponement shall be no longer than is necessary to complete the relevant investigation or prosecution in the requested State. Before making a decision to postpone, the requested State should consider whether the assistance may be immediately provided subject to certain conditions.

2. If a decision to postpone is taken pursuant to paragraph 1, the Prosecutor may, however, seek measures to preserve evidence, pursuant to article 93, paragraph 1 (j).

**Article 95**
**Postponement of execution of a request in respect of an admissibility challenge**

Without prejudice to article 53, paragraph 2, where there is an admissibility challenge under consideration by the Court pursuant to articles 18 or 19, the requested State may postpone the execution of a request under this Part pending a determination by the Court, unless the

Court has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to articles 18 or 19.

**Article 96**
**Contents of request for other forms of assistance under article 93**

1. A request for other forms of assistance referred to in article 93 shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 87, paragraph 1(*a*).

2. The request shall, as applicable, contain or be supported by the following:

(*a*) A concise statement of the purpose of the request and the assistance sought, including the legal basis and the grounds for the request;

(*b*) As much detailed information as possible about the location or identification of any person or place that must be found or identified in order for the assistance sought to be provided;

(*c*) A concise statement of the essential facts underlying the request;

(*d*) The reasons for and details of any procedure or requirement to be followed;

(*e*) Such information as may be required under the law of the requested State in order to execute the request; and

(*f*) Any other information relevant in order for the assistance sought to be provided.

3. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (e). During the consultations, the State Party shall advise the Court of the specific requirements of its national law.

4. The provisions of this article shall, where applicable, also apply in respect of a request for assistance made to the Court.

**Article 97**
**Consultations**

Where a State Party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in

order to resolve the matter. Such problems may include, *inter alia*:

(*a*) Insufficient information to execute the request;

(*b*) In the case of a request for surrender, the fact that despite be[st] efforts, the person sought cannot be located or that th[e] investigation conducted has determined that the person in th[e] custodial State is clearly not the person named in the warrant; o[r]

(*c*) The fact that execution of the request in its current form woul[d] require the requested State to breach a pre-existing treat[y] obligation undertaken with respect to another State.

**Article 98**
**Cooperation with respect to waiver of immunity and consent to surrender**

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

**Article 99**
**Execution of requests under articles 93 and 96**

1. Requests for assistance shall be executed in accordance with the relevant procedure under the law of the requested State and, unless prohibited by such law, in the manner specified in the request, including following any procedure outlined therein or permitting persons specified in the request to be present at and assist in the execution process.

2. In the case of an urgent request, the documents or evidence produced in response shall, at the request of the Court, be sent urgently.

3. Replies from the requested State shall be transmitted in their original language and form.

4. Without prejudice to other articles in this Part, where it is necessary for the successful execution of a request which can be executed without any compulsory measures, including specifically the interview of or

taking evidence from a person on a voluntary basis, including doing so without the presence of the authorities of the requested State Party if it is essential for the request to be executed, and the examination without modification of a public site or other public place, the Prosecutor may execute such request directly on the territory of a State as follows:

(*a*) When the State Party requested is a State on the territory of which the crime is alleged to have been committed, and there has been a determination of admissibility pursuant to articles 18 or 19, the Prosecutor may directly execute such request following all possible consultations with the requested State Party;

(*b*) In other cases, the Prosecutor may execute such request following consultations with the requested State Party and subject to any reasonable conditions or concerns raised by that State Party. Where the requested State Party identifies problems with the execution of a request pursuant to this subparagraph it shall, without delay, consult with the Court to resolve the matter.

5. Provisions allowing a person heard or examined by the Court under article 72 to invoke restrictions designed to prevent disclosure of confidential information connected with national defence or security shall also apply to the execution of requests for assistance under this article.

**Article 100**
**Costs**

1. The ordinary costs for execution of requests in the territory of the requested State shall be borne by that State, except for the following, which shall be borne by the Court:

(*a*) Costs associated with the travel and security of witnesses and experts or the transfer under article 93 of persons in custody;

(*b*) Costs of translation, interpretation and transcription;

(*c*) Travel and subsistence costs of the judges, the Prosecutor, the Deputy Prosecutors, the Registrar, the Deputy Registrar and staff of any organ of the Court;

(*d*) Costs of any expert opinion or report requested by the Court;

(*e*) Costs associated with the transport of a person being surrendered to the Court by a custodial State; and

(*f*) Following consultations, any extraordinary costs that may result from the execution of a request.

2. The provisions of paragraph 1 shall, as appropriate, apply to requests from States Parties to the Court. In that case, the Court shall bear the ordinary costs of execution.

### Article 101
### Rule of speciality

1. A person surrendered by the Court under this Statute shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered.

2. The Court may request a waiver of the requirements of paragraph 1 from the State which surrendered the person to the Court and, if necessary, the Court shall provide additional information in accordance with article 91. States Parties shall have the authority to provide a waiver to the Court and should endeavour to do so.

### Article 102
### Use of terms

For the purposes of this Statute:

(*a*) "surrender" means the delivering up of a person by a State to the Court, pursuant to this Statute.

(*b*) "extradition" means the delivering up of a person by one State to another as provided by treaty, convention or national legislation.

## PART 10. ENFORCEMENT

### Article 103
### Role of States in enforcement of sentences of imprisonment

1. (*a*) A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons.

(*b*) At the time of declaring its willingness to accept sentenced persons, a State may attach conditions to its acceptance as agreed by the Court and in accordance with this Part.

(*c*) A State designated in a particular case shall promptly inform the Court whether it accepts the Court's designation.

2. (*a*) The State of enforcement shall notify the Court of any circumstances, including the exercise of any conditions agreed under paragraph 1, which could materially affect the terms or extent of the imprisonment. The Court shall be given at least 45 days' notice of any such known or foreseeable circumstances. During this period, the State of enforcement shall take no action that might prejudice its obligations under article 110.

(*b*) Where the Court cannot agree to the circumstances referred to in subparagraph (a), it shall notify the State of enforcement and proceed in accordance with article 104, paragraph 1.

3. In exercising its discretion to make a designation under paragraph 1, the Court shall take into account the following:

(*a*) The principle that States Parties should share the responsibility for enforcing sentences of imprisonment, in accordance with principles of equitable distribution, as provided in the Rules of Procedure and Evidence;

(*b*) The application of widely accepted international treaty standards governing the treatment of prisoners;

(*c*) The views of the sentenced person; and

(*d*) The nationality of the sentenced person;

(*e*) Such other factors regarding the circumstances of the crime or the person sentenced, or the effective enforcement of the sentence, as may be appropriate in designating the State of enforcement.

4. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State, in accordance with the conditions set out in the headquarters agreement referred to in article 3, paragraph 2. In such a case, the costs arising out of the enforcement of a sentence of imprisonment shall be borne by the Court.

**Article 104**
**Change in designation of State of enforcement**

1. The Court may, at any time, decide to transfer a sentenced person to a prison of another State.

2. A sentenced person may, at any time, apply to the Court to be transferred from the State of enforcement.

**Article 105**
**Enforcement of the sentence**

1. Subject to conditions which a State may have specified in accordance with article 103, paragraph 1 (b), the sentence of imprisonment shall be binding on the States Parties, which shall in no case modify it.

2. The Court alone shall have the right to decide any application for appeal and revision. The State of enforcement shall not impede the making of any such application by a sentenced person.

## Article 106
## Supervision of enforcement of sentences and conditions of imprisonment

1. The enforcement of a sentence of imprisonment shall be subjec to the supervision of the Court and shall be consistent with widely accepted international treaty standards governing treatment of prisoners.

2. The conditions of imprisonment shall be governed by the law of the State of enforcement and shall be consistent with widely accepted international treaty standards governing treatment of prisoners; in no case shall such conditions be more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement.

3. Communications between a sentenced person and the Court shall be unimpeded and confidential.

## Article 107
## Transfer of the person upon completion of sentence

1. Following completion of the sentence, a person who is not a national of the State of enforcement may, in accordance with the law of the State of enforcement, be transferred to a State which is obliged to receive him or her, or to another State which agrees to receive him or her, taking into account any wishes of the person to be transferred to that State, unless the State of enforcement authorizes the person to remain in its territory.

2. If no State bears the costs arising out of transferring the person to another State pursuant to paragraph 1, such costs shall be borne by the Court.

3. Subject to the provisions of article 108, the State of enforcement may also, in accordance with its national law, extradite or otherwise surrender the person to the State which has requested the extradition or surrender of the person for purposes of trial or enforcement of a sentence.

## Article 108
## Limitation on the prosecution or punishment of other offences

1. A sentenced person in the custody of the State of enforcement shall not be subject to prosecution or punishment or to extradition to a third State for any conduct engaged in prior to that person's delivery to the State of enforcement, unless such prosecution, punishment or extradition has been approved by the Court at the request of the State of enforcement.

2. The Court shall decide the matter after having heard the views of he sentenced person.

3. Paragraph 1 shall cease to apply if the sentenced person remains voluntarily for more than 30 days in the territory of the State of enforcement after having served the full sentence imposed by the Court, or returns to the territory of that State after having left it.

### Article 109
### Enforcement of fines and forfeiture measures

1. States Parties shall give effect to fines or forfeitures ordered by the Court under Part 7, without prejudice to the rights of bona fide third parties, and in accordance with the procedure of their national law.

2. If a State Party is unable to give effect to an order for forfeiture, it shall take measurs to recover the value of the proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of bona fide third parties.

3. Property, or the proceeds of the sale of real property or, where appropriate, the sale of other property, which is obtained by a State Party as a result of its enforcement of a judgment of the Court shall be transferred to the Court.

### Article 110
### Review by the Court concerning reduction of sentence

1. The State of enforcement shall not release the person before expiry of the sentence pronounced by the Court.

2. The Court alone shall have the right to decide any reduction of sentence, and shall rule on the matter after having heard the person.

3. When the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time.

4. In its review under paragraph 3, the Court may reduce the sentence if it finds that one or more of the following factors are present:

(*a*) The early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions;

(*b*) The voluntary assistance of the person in enabling the enforcement of the judgments and orders of the Court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims; or

(*c*) Other factors establishing a clear and significant change circumstances sufficient to justify the reduction of sentence, provided in the Rules of Procedure and Evidence.

5. If the Court determines in its initial review under paragraph that it is not appropriate to reduce the sentence, it shall thereafter revi the question of reduction of sentence at such intervals and applyi such criteria as provided for in the Rules of Procedure and Evidence

**Article 111**
**Escape**

If a convicted person escapes from the custody and flees the Sta of enforcement, that State may, after consultation with the Court, reque the person's surrender from the State in which the person is locate pursuant to existing bilateral or multilateral arrangements, or may reques that the Court seek the person's surrender. It may direct that the perso be delivered to the State in which he or she was serving the sentence o to another State designated by the Court.

## PART 11. ASSEMBLY OF STATES PARTIES

**Article 112**
**Assembly of States Parties**

1. An Assembly of States Parties to this Statute is hereby established Each State Party shall have one representative in the Assembly wh may be accompanied by alternates and advisers. Other States whic have signed the Statute or the Final Act may be observers in th Assembly.

2. The Assembly shall:

(*a*) Consider and adopt, as appropriate, recommendations of th Preparatory Commission;

(*b*) Provide management oversight to the Presidency, the Prosecuto and the Registrar regarding the administration of the Court;

(*c*) Consider the reports and activities of the Bureau establishe under paragraph 3 and take appropriate action in regard thereto

(*d*) Consider and decide the budget for the Court;

(*e*) Decide whether to alter, in accordance with article 36, the numbe of judges;

(*f*) Consider pursuant to article 87, paragraphs 5 and 7, any questio relating to non-cooperation;

(*g*) Perform any other function consistent with this Statute or the Rules of Procedure and Evidence.

3. (*a*) The Assembly shall have a Bureau consisting of a President, two Vice-Presidents and 18 members elected by the Assembly for three-year terms.

(*b*) The Bureau shall have a representative character, taking into account, in particular, equitable geographical distribution and the adequate representation of the principal legal systems of the world.

(*c*) The Bureau shall meet as often as necessary, but at least once a year. It shall assist the Assembly in the discharge of its responsibilities.

4. The Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy.

5. The President of the Court, the Prosecutor and the Registrar or their representatives may participate, as appropriate, in meetings of the Assembly and of the Bureau.

6. The Assembly shall meet at the seat of the Court or at the Headquarters of the United Nations once a year and, when circumstances so require, hold special sessions. Except as otherwise specified in this Statute, special sessions shall be convened by the Bureau on its own initiative or at the request of one third of the States Parties.

7. Each State Party shall have one vote. Every effort shall be made to reach decisions by consensus in the Assembly and in the Bureau. If consensus cannot be reached, except as otherwise provided in the Statute:

(*a*) Decisions on matters of substance must be approved by a two-thirds majority of those present and voting provided that an absolute majority of States Parties constitutes the quorum for voting;

(*b*) Decisions on matters of procedure shall be taken by a simple majority of States Parties present and voting.

8. A State Party which is in arrears in the payment of its financial contributions towards the costs of the Court shall have no vote in the Assembly and in the Bureau if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The Assembly may, nevertheless, permit such a State Party to vote in the Assembly and in the Bureau if it is satisfied that the failure to pay is due to conditions beyond the control of the State Party.

9. The Assembly shall adopt its own rules of procedure.

10. The official and working languages of the Assembly shall be those of the General Assembly of the United Nations.

## PART 12. FINANCING

### Article 113
### Financial Regulations

Except as otherwise specifically provided, all financial matters related to the Court and the meetings of the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be governed by this Statute and the Financial Regulations and Rules adopted by the Assembly of States Parties.

### Article 114
### Payment of expenses

Expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be paid from the funds of the Court.

### Article 115
### Funds of the Court and of the Assembly of States Parties

The expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following sources:

(*a*) Assessed contributions made by States Parties;

(*b*) Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council.

### Article 116
### Voluntary contributions

Without prejudice to article 115, the Court may receive and utilize, as additional funds, voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties.

**Article 117**
**Assessment of contributions**

The contributions of States Parties shall be assessed in accordance vith an agreed scale of assessment, based on the scale adopted by the Jnited Nations for its regular budget and adjusted in accordance with ne principles on which that scale is based.

**Article 118**
**Annual audit**

The records, books and accounts of the Court, including its annual nancial statements, shall be audited annually by an independent auditor.

## PART 13. FINAL CLAUSES

**Article 119**
**Settlement of disputes**

1. Any dispute concerning the judicial functions of the Court shall e settled by the decision of the Court.

2. Any other dispute between two or more States Parties relating to ne interpretation or application of this Statute which is not settled through egotiations within three months of their commencement shall be eferred to the Assembly of States Parties. The Assembly may itself eek to settle the dispute or make recommendations on further means f settlement of the dispute, including referral to the International Court f Justice in comformity with the Statute of that Court.

**Article 120**
**Reservations**

No reservations may be made to this Statute.

**Article 121**
**Amendments**

1. After the expiry of seven years from the entry into force of this tatute, any State Party may propose amendments thereto. The text of ny proposed amendment shall be submitted to the Secretary-General f the United Nations, who shall promptly circulate it to all States Parties.

2. No sooner than three nonths from the date of notification, the ext Assembly of States Parties shall, by a majority of those present nd voting, decide whether to take up the proposal. The Assembly may

deal with the proposal directly or convene a Review Conference if t issue involved so warrants.

3. The adoption of an amendment at a meeting of the Assembly States Parties or at a Review Conference of which consensus connot reached shall require a two-thirds majority of States Parties.

4. Except as provided in paragraph 5, an amendment shall ent into force for all States Parties one year after instruments of ratificati or acceptance have been deposited with the Secretary-General of th United Nations by seven-eighths of them.

5. Any amendment to article 5 of this Statute shall enter into forc for those States Parties which have accepted the amendment one ye after the deposit of their instruments of ratification or acceptance. I respect of a State Party which has not accepted the amendment, th Court shall not exercise its jurisdiction regarding a crime covered b the amendment when committed by that State Party's nationals or on i territory.

6. If an amendment has been accepted by seven-eighths of State Parties in accordance with paragraph 4, any State Party which has no accepted the amendment may withdraw from the Statute with immediat effect, notwithstanding paragraph 1 of article 127, but subject t paragraph 2 of article 127, by giving notice no later than one year afte the entry into force of such amendment.

7. The Secretary-General of the United Nations shall circulate to a States Parties any amendment adopted at a meeting of the Assembly c States Parties or at a Review Conference.

**Article 122**
**Amendments to provisions of an institutional nature**

1. Amendments to provisions of the Statute which are of a exclusively institutional nature, namely, article 35, article 36, paragraph 8 and 9, article 37, article 38, article 39, paragraphs 1 (first tw sentences), 2 and 4, article 42, paragraphs 4 and 9, article 43, paragraph 2 and 3, and articles 44, 46 47 and 49, may be proposed at any time notwithstanding article 121, paragraph 1, by any State Party. The tex of any proposed amendment shall be submitted to the Secretary-Genera of the United Nations or such other person designated by the Assembl of States Parties who shall promptly circulate it to all States Parties an to others participating in the Assembly.

2. Amendments under this article on which consensus connot b reached shall be adopted by the Assembly of States Parties or by Revie Conference, by a two-thirds majority of States Parties. Such amendmen

all enter into force for all States Parties six months after their adoption the Assembly or, as the case may be, by the Conference.

**Article 123**
**Review of the Statute**

1. Seven years after the entry into force of this Statute the Secretary-eneral of the United Nations shall convene a Review Conference to onsider any amendments to this Statute. Such review may include, but not limited to, the list of crimes contained in article 5. The Conference all be open to those participating in the Assembly of States Parties nd on the same conditions.

2. At any time thereafter, at the request of a State Party and for the urposes set out in paragraph 1, the Secretary-General of the United ations shall, upon approval by a majority of States Parties, convene a eview Conference.

3. The provisions of article 121, paragraphs 3 and 7, shall apply to e adoption and entry into force of any amendment to the Statute onsidered at a Review Conference.

**Article 124**
**Transitional Provision**

Notwithstanding article 12 paragraph 1, a State, on becoming a party this Statute, may declare that, for a period of seven years after the ntry into force of this Statute for the State concerned, it does not accept e jurisdiction of the Court with respect to the category of crimes referred in article 8 when a crime is alleged to have been committed by its ationals or on its territory. A declaration under this article may be ithdrawn at any time. The provisions of this article shall be reviewed the Review Conference convened in accordance with article 123, aragraph 1.

**Article 125**
**Signature, ratification, acceptance, approval or accession**

1. This Statute shall be open for signature by all States in Rome, at e headquarters of the Food and Agriculture Organization of the United ations, on 17 July 1998. Thereafter, it shall remain open for signature Rome at the Ministry of Foreign Affairs of Italy until 17 October 998. After that date, the Statute shall remain open for signature in ew York, at United Nations Headquarters, until 31 December 2000.

2. This Statute is subject to ratification, acceptance or approval by gnatory States. Instruments of ratification, acceptance or approval shall

be deposited with the Secretary-General of the United Nations.

3. This Statute shall be open to accession by all States. Instrume of accession shall be deposited with the Secretary-General of the Uni Nations.

**Article 126**
**Entry into force**

1. This Statute shall enter into force on the first day of the mon after the 60th day following the date of the deposit of the 60th instrume of ratification, acceptance, approval or accession with the Secretar General of the United Nations.

2. For each State ratifying, accepting, approving or acceding to th Statute after the deposit of the 60th instrument of ratification, acceptanc approval or accession, the Statute shall enter into force on the first da of the month after the 60th day following the deposit by such State o its instrument of ratification, acceptance, approval or accession.

**Article 127**
**Withdrawal**

1. A State Party may, by written notification addressed to th Secretary-General of the United Nations, withdraw from this Statute The withdrawal shall take effect one year after the date of receipt of th notification, unless the notification specifies a later date.

2. A State shall not be discharged, by reason of its withdrawal, fror the obligations arising from this Statute while it was a Party to the Statute including any financial obligations which may have accrued. It withdrawal shall not affect any cooperation with the Court in connectio with criminal investigations and proceedings in relation to which th withdrawing State had a duty to cooperate and which were commence prior to the date on which the withdrawal became effective, nor shall i prejudice in any way the continued consideration of any matter whic was already under consideration by the Court prior to the date on whic the withdrawal became effective.

**Article 128**
**Authentic texts**

The original of this Statute, of which the Arabic, Chinese, English French, Russian and Spanish texts are equally authentic, shall b deposited with the Secretary-General of the United Nations, who shal send certified copies thereof to all States.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Statute.

DONE at Rome, this 17th day of July 1998.

# II. A. THE LAHORE DECLARATION*

The following is the text of the Lahore Declaration signed by the Prime Minister, Mr. Atal Behari Vajpayee, and the Pakistan Prime Minister. Mr. Muhammad Nawaz Sharif, in Lahore on Sunday:

The Prime Ministers of the Republic of India and the Islamic Republic of Pakistan:

***Sharing*** a vision of peace and stability between their countries, and of progress and prosperity for their peoples;

***Convinced*** that durable peace and development of harmonious relations and friendly cooperation will serve the vital interests of the peoples of the two countries, enabling them to devote their energies for a better future;

***Recognising*** that the nuclear dimension of the security environment of the two countries adds to their responsibility for avoidance of conflict between the two countries;

***Committed*** to the principles and purposes of the Charter of the United Nations, and the universally accepted principles of peaceful co-existence;

***Reiterating*** the determination of both countries to implementing the Shimla Agreement in letter and spirit;

***Committed*** to the objective of universal nuclear disarmament and non-proliferation;

***Convinced*** of the importance of mutually agreed confidence·building measures for improving the security environment;

***Recalling*** their agreement of 23 September 1988, that an environment of peace and security in the supreme national interest of both sides and that the resolution of all outstanding issues, including Jammu and Kashmir, is essential for this purpose;

***Have agreed*** that their respective Governments:

shall intensify their efforts to resolve all issues, including the issue of Jammu and Kashmir;

shall refrain from intervention and interference in each other's internal affairs;

shall intensify their composite and integrated dialogue process for an early and positive outcome of the agreed bilateral agenda;

shall take immediate steps for reducing the risk of accidental or unauthorised use of nuclear weapons and discuss concepts and doctrines

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* *Source*: The Hindu (New Delhi), 22 February 1999, p. 8.

with a view to elaborating measures for confidence building in the nuclear and conventional fields, aimed at prevention of conflict.

***Reaffirm*** their commitment to the goals and objectives of SAARC and to concert their efforts towards the realisation of the SAARC vision for the year 2000 and beyond with a view to promoting the welfare of the peoples of South Asia and to improve their quality of life through accelerated economic growth, social progress and cultural development.

***Reaffirm*** their condemnation of terrorism in all its forms and manifestations and their determination to combat this menace.

shall promote and protect all human rights and fundamental freedoms.

Signed at Lahore on the 21st day of February 1999.

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|---|---|
| Atal Behari Vajpayee<br>Prime Minister of the<br>Republic of India | Muhammad Nawaz Sharif<br>Prime Minister of the Islamic<br>Republic of Pakistan |

## B. JOINT STATEMENT

The following is the text of the Joint Statement issued at the end of the Prime Minister, Mr. Atal Behari Vajpayee's visit to Lahore:

In response to an invitation by the Prime Minister of Pakistan, Mr. Muhammad Nawaz Sharif, the Prime Minister of India, Shri Atal Behari Vajpayee, visited Pakistan from 20-21 February, 1999, on the inaugural run of the Delhi-Lahore bus service.

2. The Prime Minister of Pakistan received the Indian Prime Minister at the Wagah border on 20th February 1999. A banquet in honour of the Indian Prime Minister and his delegation was hosted by the Prime Minister of Pakistan at Lahore Fort, on the same evening. Prime Minister, Atal Behari Vajpayee, visited Minar-e Pakistan, Mausoleum of Allama Iqabal, Gurudawara Dera Sahib and Samadhi of Maharaja Ranjeet Singh. On 21st February, a civic reception was held in honour of the visiting Prime Minister at the Governor's House.

3. The two leaders held discussions on the entire range of bilateral relations, regional cooperation within SAARC, and issues of international concern. They decided that:

(*a*) The two Foreign Ministers will meet periodically to discuss all issues of mutual concern, including nuclear related issues

(*b*) The two sides shall undertake consultations on WTO relat issues with a view to coordinating their respective positions.

(*c*) The two sides shall determine areas of cooperation in Informati Technology, in particular for tackling the problems of Y2K.

(*d*) The two sides will hold consultations with a view to furth liberalising the visa and travel regime.

(*e*) The two sides shall appoint a two-member committee ministerial level to examine humanitarian issues relating t civilian detainees and missing POWs.

4. They expressed satisfaction on the commencement of a Bu Service between Lahore and New Delhi, the release of fishermen an civilian detainees and the renewal of contacts in the field of sports.

5. Pursuant to the directive given by the two Prime Ministers, th Foreign Secretaries of Pakistan and India signed a Memorandum o Understanding on 21st February 1999, identifying measures aimed a promoting an environment of peace and security between the tw countries.

6. The two Prime Ministers signed the Lahore Declaration embodyin their shared vision of peace and stability between their countries and o progress and prosperity for their peoples.

7. Prime Minister, Atal Behari Vajpayee extended an invitation t Prime Minister, Muhammad Nawaz Sharif, to visit India on mutuall convenient dates.

8. Prime Minister, Atal Behari Vajpayee, thanked Prime Minister Muhammad Nawaz Sharif, for the warm welcome and graciou hospitality extended to him and members of his delegation and for th excellent arrangements made for his visit.

Lahore,

21 February 1999.

## C. MEMORANDUM OF UNDERSTANDING

The following is the text of the Memorandum of Understandin signed by the Foreign Secretary, Mr. K. Raghunath, and the Pakista Foreign Secretary, Mr. Shamshad Ahmad, in Lahore on Sunday:

The Foreign Secretaries of India and Pakistan:-

*Reaffirming* the continued commitment of their respective governments to the principles and proposes of the U.N. Charter;

*Reiterating* the determination of both countries to implementing the Shimla Agreement in letter and spirit;

*Guided* by the agreement between their Prime Ministers of 23rd September 1998 that an environment of peace and security is in the supreme national interest of both sides and that resolution of all outstanding issues, including Jammu and Kashmir, is essential for this purpose;

*Pursuant* to the directive given by their respective Prime Ministers in Lahore, to adopt measures for promoting a stable environment of peace, and security between the two countries;

Have on this day, agreed to the following:-

1. The two sides shall engage in bilateral consultations on security concepts, and nuclear doctrines, with a view to developing measures for confidence building in the nuclear and conventional fields, aimed at avoidance of conflict.

2. The two sides undertake to provide each other with advance notification in respect of ballistic missile flight tests, and shall conclude a bilateral agreement in this regard.

3. The two sides are fully committed to undertaking national measures to reducing the risks of accidental or unauthorised use of nuclear weapons under their respective control. The two sides further undertake to notify each other immediately in the event of any accidental, unauthorised or unexplained incident that could create the risk of a fallout with adverse consequences for both sides, or an outbreak of an nuclear war between the two countries, as well as to adopt measures aimed at diminishing the possibility of such actions, or such incidents being misinterpreted by the other. The two sides shall identify/establish the appropriate communication mechanism for this purpose.

4. The two sides shall continue to abide by their respective unilateral moratorium on conducting further nuclear test explosions unless either side, in exercise of its national sovereignty decides that extraordinary events have jeopardised its supreme interests.

5. The two sides shall conclude an agreement on prevention of incidents at sea in order to ensure safety of navigation by naval vessels, and aircraft belonging to the two sides.

6. The two sides shall periodically review the implementation of existing Confidence Building Measures (CBMs) and where necessary, set up appropriate consultative mechanisms to monitor and ensure

effective implementation of these CBMs.

7. The two sides shall undertake a review of the existing communication links (e.g. between the respective Directors-General, Military Operations) with a view to upgrading and improving these links, and to provide for fail-safe and secure communications.

8. The two sides shall engage in bilateral consultations on security, disarmament and non-proliferation issues within the context of negotiations on these issues in multilateral fora.

Where required, the technical details of the above measures will be worked out by experts of the two sides in meetings to be held on mutually agreed dates, before mid-1999, with a view to reaching bilateral agreements.

Done at Lahore on 21st February 1999 in the presence of Prime Minister of India, Mr. Atal Behari Vajpayhee, and Prime Minister of Pakistan, Mr. Muhammad Nawaz Sharif.

(K. Raghunath)
Foreign Secretary of the
Republic of India

(Shamshad Ahmad)
Foreign Secretary of the
Islamic Republic of Pakistan

## BOOK REVIEWS

**P. CHANDRASHEKARA RAO.** ***The Arbitration and Conciliation Act, 1996*** **(Universal Law Publishing Co., New Delhi, 1997), pp. 518, Rs. 450/-**

For the first time, we have in India a comprehensive piece of legislation which governs domestic and international commercial arbitration and conciliation. The 1940 Arbitration Act which caused in the years past grave problems in the matter of international commercial arbitration stands repealed by the new legislation. Businessmen and lawyers might, therefore, find the appearance of Arbitration and Conciliation Act in 1996 (hereinafter the Act) and the commentary thereon in 1997 welcome indeed.

The Act is professedly based upon UNCITRAL's Model Law on International Commercial Arbitration (The Model Law) and the UNICITRAL Conciliation Rules of 1980. The author finds the Model Law and the Conciliation Rules most suitable to serve the needs of Indian businessmen. The author is no doubt welcome to hold the view that the Model Law can serve as a basis for the new Indian law. However, there is one problem, whether the exposition of the content of the provisions of the Act should be explained in the context of international origins or should they be interpreted as any other Indian enactment. I would have preferred the latter approach, if for no other reason than getting an insight into the Indian legislation by the author, who more than any other person, was responsible for the passing of the new legislation.

The Act in question follows the Model Law in its essentials except in a few instances of major importance. For example, "international commercial arbitration" has been defined in the main in terms of the foreign nationality or habitual residence or the foreign incorporation of the body corporate of one of the parties or its central management. On the other hand, international commercial arbitration is defined by the Model Law to include not only cases where the places of business are situated in different states but also when the subject matter of the arbitration agreement is related to more than one state. It would, accordingly, appear that the Model Law definition is wider than that of the Indian enactment.

Of deeper implication is Section 11(10) of the Act which empowers the Chief Justice of India to appoint any person or institution designated by him to exercise his discretion in the appointment process. We find this provision to be rather extraordinary in view of the fact that the Chief Justice of India's decisions as regards the appointment of

arbitrator(s) can at any time be questioned before a High Court or the Supreme Court of India.

The extent to which the Indian Act either conforms to or departs from the Model Law is to be found at pp. 10 to 15 of the book. One of the changes prescribes that all awards given in foreign countries are foreign awards (see Section 2(7) of the Act). The author writes at p.14 that as a result of this change the 'unhappy controversy' as to what constitutes a foreign award is now set at rest. More significantly, the provisions of the old legislation in which the courts were conferred wide powers of supervision are now repealed. Section 5 of the 1966 Act illustrates this point. The author notes at page 52 that the main object of Section 5 is to ensure that no judicial authority exercises powers except as specified by Part I and that no such authority exercises any general or residual powers which are not provided for in that part "so that the parties know exactly what functions have been entrusted to judicial authorities in matters governed by Part I." It is true that the supervisory role of the courts has been a thorn in the side of international commercial arbitration and consequently the court's powers needed pruning. But the question is: has the new legislation exceeded the inherent qualities of judicial powers in any sense of the term? In a democratic system of law the court is the only institution which can balance competing interests and act as a citadel for fair play and justice.

Nonetheless, I welcome the checks and balances provided by the Act on judicial review.

In the final analysis, this work of Dr. P.C. Rao has made a valuable contribution to the growing law of international commercial arbitration. Dr. Rao deserves to be congratulated for having found the time to write a commentary on the Act amidst his multifarious responsibilities as the Law Secretary of the Government of India. The weakness in his methodology, referred to earlier, should not be considered as a serious blemish.

M K NAWAZ*

* Of the Board of Editors.

**JALIL KASTO,** ***International Law of Technology*** **published as International Law Series No. 1 (London Print Centre, London WC1, 1992), pp 181, price £ 20/US $ 37.**

The advances in technology over the last two centuries, since the Industrial Revolution, have of course, been spectacular. However, the pace was accelerated over the last few decades with the exploitation of atom, the advent of computers, the race in space and the revolution in telecommunications. Luckily, the modern technology is now being applied and harnessed for improving the quality of life and betterment of mankind on the planet earth. The results have been promising and euphoria has been sustained.

Interestingly, the development of technology over the globe has been rather uneven; whereas the western world has galloped in technological advancements, the third world countries have far lagged behind in original and native innovation. It is therefore natural for industrially backward countries to seek and solicit advanced technology so as to be able to imbibe into their economies for alleviation of poverty and to improve the welfare of their people. The West, however, is hesitant and hamstrung in transfer of such technologies. This situation has several reasons. First, because most products and processes are covered by patents or are in private monopolistic control. Secondly, sophisticated and sensitive technologies are governed by restrictive regimes or subject to governmental licensing. Thirdly, prohibitive costs are quoted for the transfers which poor and backward countries can ill afford. Thus advanced technology is neither freely available nor at economically viable rates. The Shylock demands his pound of flesh and the powerful require obeisance and compromises on their sovereignty. The situation is ominous and the world order inequitous.

It is here that the importance of this book becomes obvious. It is a product of original and sustained research by the author for over a decade. He has analysed the myriad aspects on the subject of transfer of technology and germane elements of international law to evolve tentative solutions through logic which at times may appear tangentially biassed or emotionally frayed. For third world countries necessity is the biggest reason and provides unimpeachable logic. In their view the western countries only need to be considerate and human. It has also to be realised that transfer of technology is a two-way traffic and each one can cause bottlenecks to its own detriment and peril. It has thus become an important problem which has impact on comtemporary international relations of states. Therefore it has rightly evinced the genuine concern of the United Nations to rectify the skewed order and evolve just norms and equitable modalities, the call for which is so emergent and pervasive

in the underdeveloped part of the world.

The major contribution of the UN and other internation organisations in the evolution of the international law of technology the achievement of consensus on the principle that science an technology be recognised as an integral part of the Common Heritag of Mankind. This enjoins that the transfer of technology is offered t the developing countries on equitable basis, even terms and withou preconditions in the overall interest of the well being of mankind an progress of the world at large. This cardinal principle, that form th legal basis, has been repeatedly enshrined and reiterated in many U.N resolutions, international declarations, bilateral agreements an multilateral treaties. Apart from this, the international law of technolog is woefully rudimentary as contained in conventions and highly primitiv in customary aspects. Vested interests and power leverages still rul the roost and governance in this area according to the rule of law i likely to be slow and evolutional.

The book has been divided into seven chapters. Chapter one brings out the impact and importance of technology for internationa community and the evolution of international law of technology. Chapte two makes a comparative analysis of the conflicting principles of nationa law with international law concerning technology. On the one hand national law protects private, exclusive rights in intellectual, industria and commercial property, on the other the international doctrine of the Common Heritage of Mankind regards "technology as one of the riches of mankind which should benefit all people and states on the basis of international solidarity" and exhorts "to put technology at the disposa of the international community on the basis of justice and equity — ir order to improve — economic and social conditions".

Chapter three relates to the differentials in the thresholds of technology and the gap between rich and poor nations to emphasise "the need for a change in economic relations" and advocates the urgency and importance to bring about New International Economic Order (NIEO). The author also alludes to the brain drain and immigration of skilled personnel to the developed countries which must be halted immediately and reasonable solution found through global cooperation and understanding. Chapter four deals with the impact of information technology and highlights the new rights and obligations created by this revolution. He has also focussed attention "on the misuse of computer, torts and crimes committed by computer users" like "hacking, fraud, theft, piracy and criminal damage" *vis a vis* the individual right to privacy as expounded in the European Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.

1981, and Data Protection Act, 1984 in the U.K. The author has rightly stressed on the need for innovative doctrines, appropriate legislation and judicial awareness to curb apprehended offences and ensure "fairness, legitimacy, necessity, confidentiality" in processing of data.

Chapter five concentrates on transfer of technology and attempts to vindicate the profound effect it has on international economic relations. The consistent efforts by the UNCTAD towards formulation of a viable strategy are indeed laudable. This organisation has succeeded in formulating International Code of Conduct on the Transfer of Technology harmonising national law, policy and restrictions with the compulsions for international flow of technology in favour of under-developed nations.

Chapter six expounds the role of technology in the progress of mankind and harnessing it for peaceful purposes. Technological progress should help "in finding solutions of unemployment, use of more human labour, exploitation and development of natural resources and strengthening the international collaboration and the developing of the Third World". There is a clear focus on the role of technology in the emancipation of man and that it should lead to more freedom, better welfare and all round progress of mankind. It should not stray to neo-colonisation nor accelerate arms race. Chapter seven concerns developing countries and their access to technology. It asserts that access "involves freedom to acquire and exchange technology and technical knowhow" which is beset with obstacles like "patent rights, monopoly and secrecy". And finally this chapter admirably presents a systematic study of the means of access to technology as a pragmatic solution.

This book is a commendable attempt to treat a nascent and nebulous subject in the context of emerging international law *vis a vis* established national precepts, and cull out codes and doctrines to vindicate and facilitate transfer of technology to the poor, under developed, third world countries. This is the burden of the rich and should be carried by them gracefully.

It is an excellent book, on an important and topical subject, borne out of scholastic research for over a decade. It is highly recommended to students of international law, scientists and technologists, industrial enterprises, international organisations, planners and strategists in the developing as well as developed countries. It will also be found eminently useful by the bench and the bar as also the universities.

G.S. SACHDEVA*

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**S. BHATT,** ***The New Aviation Policy of India: Liberalisation and Deregulation*** **( Lancers Books, New Delhi, 1997), Price Rs. 350/-, pp.256+xv.**

Over the last two decades global aviation has undergone rap transformation not only in operational activities due to the advances technology but also in the transport activities (commercial) due to t change in national aviation policies. Globalisation, liberalisation a privatisation are the emerging trends in the context of changi economic structure which brought significant changes in nation aviation policies. In view of these developments, the Government India also proposed a new aviation policy to keep pace with the ongoi changes. The book under review comprises of 8 chapters primari focussed on some policy aspects of Indian Civil Aviation pertaining t

A. Transport activities..................commercial interests of national airlines;

B. Infrastructure facilities.....................development and modernisation of airports; and

C. Tourism.

The aim of the book, as Professor Bhatt says, is to analyse India' air transport policy issues in the context of newly emerging global orde in international civil aviation (p.1). The contextual significance of th statement, perhaps may be oriented either to analyse certain existin policy aspects or an attempt to provide a guiding source to th Government of India to formulating a new aviation policy. Until recentl there was no such aviation policy existing in India. Only in 1997 th Government of India constituted a committee to formulate a policy whic is until now in its formative (drafting) stage.

In the very introductory chapter the author stresses the importanc of global objectives of aviation and air transport as embodied in th Chicago Convention 1944. To achieve and accomplish these objective the International Civil Aviation Organisation (ICAO), a specialize agency of the UN, set forth certain guidelines which are basicall persuasive in nature. As author quotes from Bickley, "the role of ICA is confined to serving states through the provision of information an policy guidance, while also providing a forum for discussion of majo problems at the multilateral level" (p.5). The role of International A Transport Association (IATA), a non-governmental organisation, is als touched upon in this regard. Strictly speaking, the IATA's role is onl miniscule but for recognising the necessity of co-operation an

ompetition among airlines in a much less regulated environment. In ther words, co-operation for the survival of airlines (in the form of lliances) and competition, more of consumer oriented is the accepted ractice of airline industry to achieve new aviation order. Otherwise e market reality would be a oligopoly, save the new aviation order.

The second chapter dwells upon the historical significance of Indian ivil aviation. In an elusive style the author narrates the landmark evelopments of aviation industry in both pre- and post-nationalisation ra (pre - 1953 to 1994). Commercial operations in India began with a andful of private operators in a relatively less regulated environment. Vith the adoption of Air Corporations Act, 1953 the Government of ndia nationalised the aviation industry and conferred the monopoly on ational airlines (AI & IA). Taking cue from the economic liberalisation he Government once again demonopolised the national airlines and hereby permitted the operations of private airlines under Air Corporations (Transfer of Undertakings Repeal) Act of 1994. The author oints out that "the Act of 1994 has set a new trend for privatisation of ir transport industry" (p.11). In sharp contrast to this, out of 7 private cheduled airlines who started their operations soon after the repeal of he 1953 Act, only 2 are surviving barring a few air taxis. The point is hat privatisation of the industry and private airline operations occupied nly an insignificant place on the aviation map of India. In India, like ny other developing country, success rate in air transportation is irectly related to co-operation not only between airlines but also etween airlines and the Government in a less regulated environment nlike a deregulated environment as in the case of the USA.

Deregulation of air transport and its consequences are closely xamined by the author in chapter III, however, without arriving at efinite conclusions about the consequences of deregulation (p. 48). nstead, the author quotes some of the experts' opinions about the eregulation based on the US experience. Increase in industry oncentration, airport congestion, price discrimination, demise of small ommuter carriers and constraints of infrastructure facilities are some f the common observations made by the majority of experts. Saving ertain short term benefits to consumers. It is therefore aptly submitted hat deregulation is not the only panacea for all evils (p. 57).

Chapter IV is mainly focussed on liberalisation of air transport within he paradigm of bilateralism Vs. multilateralism controversy. Since its nception, international air transportation has been permitted on the basis f bilateral air service agreements (BASA) under the condition of strict eciprocity or *quid pro quo*. The Chicago Convention, 1944 is itself an

attempt to achieve multilateralism, but states having conservati philosophy like the UK did not conceive the idea of opening the markets without having equivalent economic benefits. Eventuall bilateralism is the 'order of the air' and is still in vogue to opera international scheduled airlines. It is thus rightly pointed out that "th credit for the development of international air transportation goes t bilateralism rather than to multilateralism" (p.63).

The changing role of AI and IA in the context of global changes i the main thrust of the chapter V. The author gives a vivid analysis o the US National Commission Report for a Strong Competitive Airlin Industry which in fact is not fitting into the main theme of the chapter The efforts made by the author are rather difficult for the reviewer to understand the correlation between the observations made in the repor and its influence exerted over AI and IA in order to change their policy in the context of global changes. The Report decried the 'controlled competition' and described the existing bilateral systems as anachronistic which prevents access to global markets (See, The National Commission to Ensure a Strong Competitive Airline: A Report to the President and Congress, August 1993). In this backdrop it is difficult to discern here whether the author suggests policy makers to free the national airlines from the control so as to enable them to face the competition or merely a submission to maintain a *status quo* regulatory mechanism in the new aviation policy which is on the anvil.

Chapter VI expounds the importance of modernisation of aviation infrastructure facilities and tourism promotion. A liberal aviation policy is necessary which would entail these two aspects since they have direct bearing on the growth of civil aviation. The author, while quoting Professor Ashok Guha, connotes that "liberalisation is minimal government" or "discarding controls for regulation by price system" (p.164). The author also feels the need of open sky policy to boost tourism which the Government of India belatedly realised as a potential source of revenue. Views of several experts and recommendations of various committees have been cited in this context to privatise airports and to promote tourism. 'Some perspectives on aviation policy of India' is the main focus of chapter VII. Multilateral approach has been supported to scheduled international air transportation as it is more beneficial to meet the global demands of traffic and tourism. On the other hand, promotion of national interests of the country has been emphasised as of major importance to justify the exceptions to open sky policy.

The book no doubt is of topical importance and indeed a welcome tool for the policy makers and also scholars. A few typographical errors

nd missing of page continuation (pp. 204-205), however, hampers the eriousness of the reader.

A. Sudhakara Reddy*

* Assistant Editor.

ANNOUNCEMENT

# INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

# (UNIDROIT)

**Purpose**

The International Institute for the Unification of Private La (UNIDROIT) is an independent intergovernmental organisation with it seat in Rome. Its purpose is to examine ways of harmonising and co ordinating the private law of States and groups of States, and to prepar gradually for the adoption by States of uniform rules of private law.

**Origins**

Set up in 1926 as an auxiliary organ of the Legue of Nations, th Institute was, following the demise of the League, re-established in 194 on the basis of a multilateral agreement, the UNIDROIT Statute.

**Membership**

Membership of UNIDROIT is restricted to States acceding to th UNIDROIT Statute. UNIDROIT'S member States are drawn from th five continents and represent a variety of different legal, economic an political systems.

**Funding**

The Institute is financed by annual contributions from its membe States which are fixed by the General Assembly as well as a basic annua contribution from the Italian Government.

**Structure**

UNIDROIT has an essentially three-tiered structure, made up of Secretariat, a Governing Council and a General Assembly.

- The *Secretariat* is the executive organ of UNIDROIT responsibl for the day-to-day carrying out of its Work Programme. It is ru by a Secretary-General, who is appointed by the Governin Council on the nomination of the President of the Institute. Th Secretary-General is assisted by a staff of international civ servants and various ancillary staff.

- The *Governing Council* supervises all policy aspects of the means by which the Institute's statutory objectives are to be attained and in particular the Secretariat's carrying out of the Work Programme, the drawing up of which is its responsibility. It is made up of one *ex officio* member, the President of the Institute, who is appointed by the Italian Government, and 25 elected members, typically eminent judges, academics and civil servants.
- The *General Assembly* is the ultimate decision-making organ of UNIDROIT: it votes the Institute's budget each year; it approves the Work Programme every three years; it elects the Governing Council every five years. It is made up of one representative from each member Government.

**Languages**

The official languages of UNIDROIT are English, French, German, Italian and Spanish; its working languages are English and French.

**Legislative policy**

- *Nature of uniform rules drawn up by UNIDROIT*

UNIDROIT's basic statutory objective is to prepare uniform rules of private law understood in a broad sense. However, experience has demonstrated the necessity of permitting occasional incursions into public law, especially in areas of law where hard and fast lines of demarcation are difficult to draw. Uniform rules prepared by UNIDROIT are concerned with the unification of substantive law rules; they will only include uniform conflict of law rules incidentally.

- *Technical approach to unification favoured by UNIDROIT*

UNIDROIT's independent status amongst intergovernmental organisations has enabled it to pursue working methods which have made it a particularly suitable forum for tackling more technical and correspondingly less political issues.

- *Factors determining eligibility of subjects for uniform law treatment*

The eligibility of a subject for unification will to a large extent be conditional on the perception of States being willing to accept change to their municipal law rules in favour of a new international solution on that subject. Legal and other arguments in favour of unification on a subject have accordingly to be weighed carefully against these

considerations. Similar considerations will also tend to determine t most appropriate sphere of application to be given to uniform rul that is whether they should be restricted to truly cross-border situatio or relations or extended to cover also purely internal situations relations.

- *Factor determining choice of instrument to be prepared*

The uniform rules drawn up by UNIDROIT have, in keeping wi its intergovernmental structure, traditionally tended to take the form c international Conventions, designed to apply automatically in preferenc to a State's municipal law upon completion of all the forma requirements of that State's domestic law for their entry into force However, the low priority which tends to be accorded by Government to the implementation of such Conventions and the time it therefor tends to take for them to enter into force have led to the increasin popularity of alternative forms of unification in areas where a bindin instrument is not felt to be essential. Such alternatives include mode laws which States may take into consideration when drafting domesti legislation on the subject covered or general principles addressed directl to judges, arbitrators and contracting parties who are however left fre to decide whether to use them or not. Where the subject is not judgec ripe for the drawing up of uniform rules, another alternative consists i the preparation of legal guides, typically on new business technique designed for the use of professional parties in countries unfamiliar wit the emerging contractual practice on such subjects.

**Working methods**

- *Preliminary stage: use of study groups*

Once a subject has been entered on UNIDROIT's Work Programme the Secretariat, where necessary assisted by an expert in the field, wil draw up a preliminary comparative law report designed to ascertain the desirability and feasibility of preparing uniform rules. The report sometimes including a first rough draft of such uniform rules, will ther be laid before the Governing Council which, if satisfied that a case ha been made out for the preparation of uniform rules, will typically ask the Secretariat to convene a study group, traditionally chaired by a member of the Council, for the preparation of a preliminary draf Convention or one of the alternatives mentioned above. The membershi of such study groups, made up of experts sitting in their persona capacity, is a matter of the Secretariat, which seeks to ensure as balancec a representation as possible of the world's different legal and economi

systems and geographic regions. Where a subject is considered by the Council to be ready for consideration by governmental experts without the need first to go through the study group stage, the Council may ask the Secretariat directly to convene a committee of governmental experts for the preparation of a draft Convention.

- *Intergovernmental negotiation stage*

A preliminary draft instrument established by a study group will be laid before the Governing Council for approval and advice as to the most appropriate further steps to be taken. Typically, in the case of a preliminary draft Convention, these will consist in its asking the Secretariat to convene a *committee of governmental experts* for the finalisation of a draft Convention capable of submission for adoption to a diplomatic Conference. In the case of one of the alternatives to a preliminary draft Convention not suitable by virtue of its nature for transmission to a committee of governmental experts, the Council will be called upon to authorise its publication and dissemination by UNIDROIT in the circles for which it has been prepared.

Full participation in UNIDROIT committees of governmental experts is open to representatives of all UNIDROIT member States. The Secretariat may in addition invite such other States as it deems appropriate, notably in view of the subject-matter concerned, and the relevant international organisations and professional associations to participate as observers. A draft Convention finalised by a committee of governmental experts will then be laid before the Governing Council for approval and advice as to the most appropriate further steps to be taken. Typically, where it judges that the draft Convention reflects a consensus as between the States which have participated in the committee of governmental experts and that it accordingly stands a good chance of adoption at a diplomatic Conference, these steps will consist in its authorisation of the draft Convention's transmission to a diplomatic Conference for adoption as an international Convention. Such a Conference will be convened by one of UNIDROIT'S members States.

- *Publication of UNIDROIT working materials (cf. Publications, infra)*

- *Co-operation with other international organisations*

UNIDROIT maintains close ties of co-operation with its sister international organisations, both intergovernmental and non-governmental, which in many cases take the form of co-operation agreements concluded at inter-Secretariat level.

By reason of its expertise in the international unification of la UNIDROIT is moreover at times commissioned by such oth organisations to prepare comparative law studies and/or dra Conventions designed to serve as the basis for the preparation and/ finalisation of international instruments in those organisations.

- *Network of correspondents*

UNIDROIT's ability to obtain up-to-date information on the sta of the law in all the various countries is essential to the pursuit of i statutory objectives. The information is sometimes difficult to obtai and UNIDROIT therefor maintains a network of correspondents in bot member and non-member States, who are appointed by the Governin Council from amongst academic and practising lawyers.

**Achievements**

UNIDROIT has over the years prepared over seventy studies an drafts. Many of these have resulted in international instruments including the following international Conventions, all in force unles otherwise indicated, drawn up by UNIDROIT and adopted at diplomati Conferences convened by member States of UNIDROIT:

- 1964 Convention relating to a Uniform Law on the Formatio of Contracts for the International Sale of Goods (The Hague);
- 1964 Convention relating to a Uniform Law on the Internationa Sale of Goods (The Hague);
- 1970 International Convention on the Travel Contract (Brussels)
- 1973 Convention providing a Uniform Law on the Form of a International Will (Washington);
- 1983 Convention on Agency in the International Sale of Good (Geneva) (not yet in force);
- 1988 UNIDROIT Convention on International Financial Leasin (Ottawa);
- 1988 UNIDROIT Convention on International Factorin (Ottawa);
- 1995 UNIDROIT Convention on Stolen or Illegally Exporte Cultural Objects (Rome).

In addition, UNIDROIT has published:

- Principles of International Commercial Contracts (1994);
- Guide to International Master Franchise Arrangements (1998)

UNIDROIT work has also served as the basis for a number of international instruments adopted under the auspices of other international organisations which are already in force. These include:

- 1954 Convention for the Protection of Cultural Property in Case of War (adopted under the auspices of UNESCO);
- 1955 European Convention on Establishment (Council of Europe);
- 1955 Benelux Treaty on Compulsory Insurance against Civil Liability in respect of Motor Vehicles;
- 1956 Convention on the Contract for the International Carriage of Goods by Road (CMR) (UN/ECE);
- 1958 Convention on the Recognition and Enforcement of decisions involving Obligations to support Minor Children (Hague Conference on Private International Law);
- 1959 European Convention on Compulsory Insurance against Civil Liability in respect of Motor Vehicles (Council of Europe);
- 1961 International Convention for the Protection of Performers, Producers of Phonographs and Broadcasting Organisations (ILO/UNESCO/WIPO);
- 1962 European Convention on the Liability of Hotel-keepers concerning the Property of their Guests (Council of Europe);
- Protocol No. 1 concerning rights *in rem* in inland navigation vessels and Protocol No. 2 on attachment and forced sale of inland navigation vessels annexed to the 1965 Convention on the Registration of Inland Navigation Vessels (UN/ECE);
- 1980 United Nations Convention on Contracts for the International Sale of Goods (UNCITRAL).

**Subsidiary activities**

Essential support for UNIDROIT's core activity of the drawing up of uniform rules is provided by its maintenance of a world renowned library, by its preparation of a number of specialist publications in the field of the unification of law, its legal co-operation programme, its project for a uniform law data base, and by its periodic organisation of congresses, meetings and seminars.

- *Library*

The UNIDROIT library is one of the leading documentation centres in its field and is consulted by researchers from all over the world. Its

holdings include over 230,000 books and 390 current periodica covering both a wide range of countries and all the different branch of private law, in particular commercial law, as well as priva international law and comparative law. Also with a view to makin information relating to these holdings accessible on line, the librar catalogue is in the process of being computerised.

- *Publications*

From its earliest days UNIDROIT has put out a number o publications. Foremost among these is the *Uniform Law Review / Revue de droit uniform* (ISSN 1224-3694), published on a quarterly basis since 1996 and distributed by *Giuffre* in Italy and by *Kluwer Law International* in the rest of the world. It is a bilingual publication in English and French, comprising the following sections: feature articles; international activities (including a periodical review of UNIDROIT's own activities); texts of new uniform law instruments; implementation of existing uniform law instruments; summaries of new case-law involving the application and interpretation of such instruments; book reviews and uniform law bibliography.

UNIDROIT also edits the *Digest of Legal Activities of International Organizations and other institutions* (ISBN 0-379-005225-5). This is a loose-leaf publication which is updated approximately every two years. It sets out to give an overall view of all the current activities underway within the many different international organisations active in the unification of law field.

In addition, the Institute publishes in *UNIDROIT Proceedings and Papers* annual collections of all its working materials.

- *Congresses, meetings and seminars*

UNIDROIT periodically organises international congresses, meetings and seminars to discuss topical aspects of the unification of law, such as methodology and its practical applications, whether to specific projects or in general. These events bring together judges, arbitrators, academics and practising lawyers as well as national and international civil servants.

- *Legal co-operation*

UNIDROIT sees its role in the area of legal co-operation broadly as consisting in the supplying of information and training regarding uniform private law for well qualified lawyers. In particular, a programme of scholarships, funded essentially from voluntary

contributions, was set up in 1992 for lawyers from developing countries and countries engaged in economic transition. Since its inception, this programme has enabled the Institute to welcome between twelve and fifteen researchers each year.

- *Data base on uniform law (Unilaw)*

In 1993, UNIDROIT decided to establish a data base to permit ready access by governments, judges, arbitrators, practising lawyers and scholars to up-to-date information regarding uniform law conventions and other instruments, in both English and French. It was agreed to fund the project exclusively from sources external to the regular UNIDROIT budget, and the Secretariat is now prospecting potential donors using a prototype focusing on one of the clauses of a transport law convention.

## UNIDROIT

### Update: 1 January 1999

UNIDROIT has 58 member States. These are: Argentina, Australia, Austria, Belgium, Bolivia, Brazil, Bulgaria, Canada, Chile, China, Colombia, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Egypt, Finland, France, Germany, Greece, Holy See, Hungary, India, Iran, Iraq, Ireland, Israel, Italy, Japan, Luxembourg, Malta, Mexico, Netherlands, Nicaragua, Nigeria, Norway, Pakistan, Paraguay, Poland, Portugal, Republic of Korea, Romania, Russian Federation, San Marino, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Tunisia, Turkey, United Kingdom, United States of America, Uruguay, Venezuela, Yugoslavia (former Federative Socialist Republic of).

**Work Programme for the 1999-2001 triennium** (as approved by the General Assembly at its 52nd session-Rome, 27 November 1998, on the understanding that the Secreatry-General is free to engage in the preliminary study of other topics and to propose their inclusion in the next Work Programme).

**Priority topics**

- *International interests in mobile equipment*

The Canadian Government in June 1988 proposed that UNIDROIT launch an effort designed to extend the principle of a lessor's real rights

being enforceable against its lessee's trustee in bankruptcy a unsecured creditors, enshrined in the UNIDROIT Convention International Financial Leasing, to the field of security rights in mobi equipment in general. In the light of a comparative law report and t responses to a questionnaire, a restricted working group of expert meeting in Rome in March 1992, decided that it would be both usef and feasible for UNIDROIT to prepare uniform international rules c security rights in high-value mobile equipment typically movin regularly across national frontiers in the ordinary course of business.

A study group, chaired by Professor R.M. Goode (University o Oxford) and on which experts from the worlds of law and practic served, in December 1997 established a preliminary draft UNIDROI Convention on International Interests in Mobile Equipment. Th essential purpose of the future Convention is to provide for th constitution and effects of a new international interest in mobil equipment, defined so as to embrace not only classic security interest but also what is increasingly recognised as their functional equivalent namely the lessor's interest under a leasing agreement. The efficacy o the international interest would be conditional upon its registration i an international register to be established under the future Convention The latter is intended to be supplemented by Protocols for each of the different categories of equipment encompassed by its sphere o application. Each Protocol is intended to contain those equipment-specific rules necessary to adapt the rules of the Convention to fit the special pattern of financing in respect of the relevant category.

The preliminary draft Convention, together with a preliminary draft Protocol on Matters Specific to Aircraft Equipment, was submitted to the UNIDROIT Governing Council in February 1998. The preliminary draft Protocol had been prepared, at the invitation of UNIDROIT, by a working group the core membership of which had been provided by the International Civil Aviation Organization, the International Ai Transport Association and an aviation working group, organised jointly by Airbus Industrie and The Boeing Company. The two texts were further refined following a decision of the Governing Council before being transmitted to Governments in August 1998 with a view to the first session of government experts, to be held in Rome from 1 to 12 February 1999. The intergovernmental consultation process on these texts will be co-sponsored by UNIDROIT and I.C.A.O.

- *Principles of international commercial contracts*

Following the great success in both contract and arbitration practice which greeted the publication in 1994 of the UNIDROIT Principles o

ternational Commercial Contracts, the Governing Council in April 997 decided that the working group responsible for their preparation ould be reconvened with a view to the preparation of a second edition, cover a number of subjects which were not dealt with in the first lition. The Working Group, chaired by Professor M.J. Bonell Jniversity of Rome 1), is made up of 17 experts and two international ganisations have observer status.

At its first meeting held in March 1998, the Working Group decided at the following subjects should be dealt with as a matter of priority: gency, limitation of actions, assignment of contractual rights and duties, ontracts for the benefit of a third party, set-off and waivers. The apporteurs for the different subjects were appointed on that occasion. he second session of the Working Group will be held in Bolzano, aly from 22-26 February 1999.

In a parallel development, UNIDROIT has commenced work, gether with the Centre for Comparative and Foreign Law Studies Rome), on the compilation of case law handed down by national courts nd arbitral tribunals in which reference is made to the UNIDROIT rinciples.

**ther topics under consideration**

*Model law on franchising*

The first stage of the preparation of uniform rules for international anchising having been completed with the publication of the Guide to nternational Master Franchise Arrangements, the next step will be the reparation of a model law on franchising to serve as a basis for the afting of domestic laws in this field.

The Governing Council decided at its February 1998 session to ndorse the Secretariat's proposal that the franchising study group ommence work on a draft model law on franchising, it being understood at members will participate in the preparatory meetings at their own kpense. The group is due to hold its first meeting in October 1999 to iscuss a first draft prepared by a drafting committee appointed from ithin its own ranks.

*Transnational rules of civil procedure*

The decision to include this item in the Work Programme was taken ursuant to a proposal by the American Law Institute (ALI) to prepare niform rules of procedure (including, if appropriate, provisional easures) applicable to transnational disputes once the question of

jurisdiction has been settled but before the question of recognition an enforcement of the judgment arises. The Governing Council resolve to appoint an independent expert to prepare a feasibility study on th basis of which a decision would be taken as to the work to be carrie out. If it were decided to form an expert committee, it was understoo that the two institutes would be represented equally and the greater par of expenses borne by ALI.

- *Model law on leasing*

The Governing Council voted the inclusion in the Institute's Work Programme of the preparation of a model law on leasing, drawing on the expertise already gained by UNIDROIT in this field (the 1988 UNIDROIT Convention on international leasing is currently in force between eight States), with a view to formulating a coherent response to the requirements of those developing countries and countries in economic transition currently engaged upon the reform of their domestic leasing laws as sponsored by both regional and universal development banks. Preliminary research carried out by the Secretariat has shown that external sources of funding are likely to be found to help finance the preparation of such a model law.

- *Uniform rules applicable to transport*

The Governing Council decided to include the preparation of uniform rules for transport in the Work Programme to provide assistance and co-operation to all those wishing to renew their transport laws. Collaboration with all the interested organisations was felt to be vital, as was the need for further thought as to the exact form which the UNIDROIT initiative was to take. The inclusion of this item was in any case subject to the identification of sources of funding outside the UNIDROIT budget.

# REMEDIAL JURISPRUDENCE OF THE MULTILATERAL TRADING SYSTEM: A PERSPECTIVE*

RAVINDRA PRATAP**

## I. INTRODUCTION

In a world where markets are open to trade, technology crossing borders to tap resources, ideas chasing minds affecting cultures, disputes are inevitable.[1] What is indispensable is a multilateral mechanism based on operational fairness and institutional safeguards. Perhaps for this reason, the original intention was for GATT to be placed in the institutional setting of the International Trade Organization (ITO) and the draft ITO Charter called for a rigorous dispute settlement procedure which contemplated effective use of arbitration and even appeal to the World Court in certain circumstances.[2] But, the quest of the West led by the US[3] for legal minimalism[4] to the end of trade liberalization through tariff reduction explains in part why ITO could never become a reality and the GATT was never allowed to function as an organization. Power was perceived as a guarantee to prosperity while developing countries believed predictability as a *sine qua non* for stability—the most important factor contributing to prosperity in almost all the third world countries,

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1. Four basic principles can be identified that are of particular importance in understanding the WTO: (a) non-discrimination (b) reciprocity (c) market-access (d) fair competition. These principles are not always consistent with, or complementary to, each other. There seems to be a tension between non-discrimination and reciprocity on the one hand, and between market-access and the notion of fair competition, on the other. See, B. Hoekmann and M. Kostecki, *The Political Economy of the World Trading System. From GATT to WTO* (1995), p.9

2. *Charter of the ITO*, Chapter 8, Articles 92-97. *UN Final Act and Related Documents*, UN Conference on Trade and Employment held at Havana (21 November to 24 March 1948), Interim Commission for the International Trade Organization April 1948. UN Documents E/CONF. 2178. See also, Clair Wilcox, *A Charter for World Trade* (1948), p. 159.

3. See, the debate for and against the internal mode of dispute settlement in Carrying Charge Dispute under IWA (1949) in B.S. Chimni, *International Commodity Agreements—A Legal Study* (1985).

4. Oliver Long, *Law and its Limitations in the GATT Multilateral System* (1985), p.73 See also, Kenneth Dam, *The GATT Law and International Economic Organization* (1970), p.356

in general and the LDCs, in particular. GATT is no more but the doctrine survives with a greater vigour in the WTO and, despite attempts to the contrary,[5] pragmatism[6] superseding legalism pervades into the entire dispute settlement mechanism like a brooding omnipresence, eclipsing predictability[7] — the central element in the WTO (DSU).[8]

This paper attempts to assess and explain the dispute settlement procedure of the WTO to identify issues that, I believe, are crucial to safeguard the interests of the majority membership and are critical to the credibility of the multilateral trading system. The paper is arranged in the following way: First, it gives an outline of the scope of the dispute settlement procedure of the WTO. This is followed by a discussion on the salient features of the GATT regime as it developed over the years. Then, the new dispute settlement provisions of the WTO are explained with the help of relevant cases to try understand the functioning of this continuum. And, finally, the study summarizes the preceding exercise with some concluding observations.

## II. SCOPE OF THE WTO DISPUTE SETTLEMENT PROCEDURE

The scope of the DSU as provided in Annex 2 has been summarized in the following way for the sake of convenience, understanding and analysis:

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5. 'A valid and improved system should encourage settlements by the disputants, giving them assistance in the process of settlements primarily with reference to the existing agreed rules rather than simply with reference to the relative economic or other power which the disputants possess'. See, John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (1989), p. 109.
6. '...there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge'. Article 3 (8) of the Understanding on Rules and Procedures Governing the Settlement of Disputes the "DSU"), Annex 2 to the Marrakesh Agreement Establishing the World Trade Organization, *The Results of the Uruguay Round of Multilateral Trade Negotiations — The Legal Texts* (Geneva, 1994), pp. 404-33. Further, Working Procedures of the DSU provide that the 'Members shall treat as confidential information submitted by another Member to the panel which that Member has designated as confidential'. See, Appendix 3 to the DSU.
7. Article 3 (2) of the DSU. Since attempts are generally made to settle trade disputes by mutual agreement, panels develop WTO case-law. Despite the fact that there is no trace of what is known as doctrine of precedence in GATT law, any political deal that is struck on a specific issue may potentially work as such and will then be embodied in the case-law. This creates scope for inconsistencies and militates against the spirit of rule-based system.
8. Note 7

- disputes which occur out of the Agreements listed in Appendix-1 to the DSU (Covered Agreements). These include: WTO Agreement, WTO (DSU), Multilateral Agreements on Trade in Goods,[8a] and (GATS, TRIPS and Plurilateral Trade Agreements).[8b]
- disputes between WTO members concerning their rights and obligations, both under the WTO Agreement and the WTO (DSU), taken place independently or in conjunction with any of the Covered Agreements.
- WTO dispute settlement procedure applies only to those disputes between WTO members for which consultations were requested *after* the entry into force of the WTO, *i.e.* 1 January 1995.[9]
- old disputes for which the cause of action arose *before* the coming into existence of the WTO Agreement are governed by the pre-WTO regime.[10] Old disputes arising under the Codes would remain subject to the Codes.[11]
- WTO (DSU) does not apply between any two Parties if either of the Parties at the time either becomes a Member or does not consent to such application in conformity with Article XIII of the WTO Agreement. However, during the period of co-existence of WTO and pre-WTO regimes, DSU applies to a new dispute between dual Members; second, to a dispute between a dual Member and a WTO Member; third, not to new disputes between

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8*a*. Agreements on Anti-dumping, Subsidies, Custom Valuation, Textiles, Technical Barriers to Trade (the "TBT"), and Safeguards, have special or additional dispute settlement procedures.

8*b*. These agreements have also special or additional dispute settlement procedures. In case there is a difference between DSU and special procedure of a particular agreement, the special procedure prevails. In case of a conflict between the special procedure of more than one covered agreements, the parties are encouraged to agree on some procedure. See, Article 1 (2) of the DSU.

9. Article 3 (11) of the DSU, Article 18 (3) of the Anti-dumping Agreement and Article 32 (3) of the Subsidies Agreement. Article II (4) of the WTO Agreement provides that the GATT 1947 and the GATT 1994 are "legally distinct" and coexist after the entry into force of the WTO Agreement. However, Article XIV of the WTO Agreement provides that the period of co-existence can not exceed two years. Thus, Contracting Parties to the GATT 1947 which were not WTO Members could not obtain any legal remedy. This seems to be one of the most important considerations why most of the countries found it difficult to resist pressures to join the new trading regime.

10. Article 3 (11) of the DSU.

11. See, Norio Komuro, "The WTO Dispute Settlement Mechanism, Coverage and Procedures of the WTO Understanding", *Journal of World Trade*, vol. 29 (1995), p. 41.

a WTO Member and a GATT 1947 Contracting Party.

- pre-WTO regime applies to old disputes, but only during the period of validity of the Transitional Arrangements, involving, first, dual Members during the period of co-existence; second, Contracting Parties that withdraw from the GATT 1947 and the Tokyo Round Codes during the period of co-existence whether they join the WTO or not; and finally, ex-Contracting Parties to the GATT 1947 and the Tokyo Round Codes after their termination i.e. 1996.

## III. EVOLUTION OF THE WTO DISPUTE SETTLEMENT MECHANISM: THE GATT REGIME[12]

### A. Consultation: Article XXII

The provision directed to consult with any other party requesting consultation regarding "all matters affecting the operation of this Agreement". Consultation usually took place under the auspices of a Working Party.[13]

### B. Nullification or Impairment: Article XXIII

Nullification or impairment of a benefit may result in any of the three ways: violation of a GATT provision;[14] non-violation measures[15] and, finally, as a result of the existence of any other situation.[16] The provision directs parties to give 'sympathetic consideration' to claims and a failure to reach a 'satisfactory adjustment... within a reasonable time'[17] is a *sine qua non* for referral to the Contracting Parties.

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12. Besides Article XXIII, pre-WTO regime consists of: (i) 1979 Tokyo Round Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance (the "1979 Understanding"); (ii) 1982 Decision on Dispute Settlement Procedures (the "1982 Decision"); (iii) 1984 Decision on Dispute Settlement Procedures (the "1984 Decision"); (iv) 1989 Decision on Improvements to the GATT Dispute Settlement Rules and Procedures (the "1989 Decision"); and (v) 1966 Decision on Procedures under Article XXIII applying to disputes between a developing country Contracting Party and developed country Contracting Party (the "1966 Decision"). Articles XXII and XXIII are to be interpreted along with these supplementary provisions.
13. Jackson, note 5, p.94.
14. Article XXIII (1) (a).
15. Article XXIII (1) (b).
16. Article XXIII (1) (c).
17. Article XXIII (2) (a) of the GATT 1947.

## C. Panel Process

Article XXIII did not articulate the means by which the Contracting Parties were to investigate complaints. The earliest method was a simple ruling from the chairperson of a session of the Contracting Parties.[18] Early complaints were also dealt with by Working Parties which were small negotiating bodies comprised of the disputing countries, interested parties and a small number of neutral countries.[19] In 1950, the GATT introduced the third method of dispute settlement, an experimental new type of Working Party, comprised of the two disputants and three neutral Parties.[20] This Working Party—a precursor to the dispute settlement panel-would issue a decision despite the disagreement of one of the disputants.[21] The use of panel in place of Working Party emerged at the seventh session of the Contracting Parties when Norway advanced a claim of nullification or impairment against the FRG.[22] Panel procedure evolved over time and became custom[23] and the transition from Working Parties to panels signified a more rule-oriented process for settling disputes.[24] Now to a question as to where did the GATT panel fall on the spectrum between formal adjudication of rights and informal conciliation of benefits, a little more discussion will be of use.

### *1. Evolution*

The history of panel process can be divided into four parts each of which corresponds to a decade.[25] In the first period from (1948-1959), the GATT was comprised of less than forty countries. Fifty-three complaints were filed in this period of which twenty proceeded to panels. It was during this period that the use of dispute settlement panels developed. The 1960s were a period of significant growth in the GATT

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18. Robert E. Hudec, *The GATT Legal System and World Trade Diplomacy* (1990), pp. 75-76. See, *Application of Article 1 (1) to Rebates on Internal Taxes,* 2 General Agreement on Tariffs and Trade, Basic Instrument and Selected Documents (hereinafter cited as" BISD"), 12 (1948).
19. See, *Australian Subsidy on Ammonium Sulphate*, 2 BISD 188 (1950); Jackson, note 5, p. 173; Hudec, note 18, p. 79.
20. *Ibid.* Working Parties were not used solely for disputes resolution, they were also used-and continue to be used by most international organizations-to effect work that could not be accomplished in formal plenary sessions. See, Hudec, note 18, p.78.
21. 2 BISD, note 19, pp. 195-196.
22. This is recounted in Hudec's 1990 study, note 18, p.85
23. Long, note 4, p.73.
24. Jackson, note 5, p.95.
25. Philip M. Nicholas, "GATT Doctrine", *Virginia Journal of International Law*, vol 36 (1996), p.397.

membership but of stagnation in the dispute settlement process. The two major constitutive changes in the GATT were the *de facto* assumption by the EEC of the six seats held by its member-states[26] and a substantial increase in the number of developing country members following rapid decolonization. Developing countries wanted flexibility for themselves and a stricter legal system to force developed countries to respect their obligations, whereas the US and the EEC joined in a stand against legalism.[27] In fact, no complaints were filed during this period and, as a result, dispute panels fell into disuse because some Contracting Parties feared that invocation of this procedure would be deemed an unfriendly act or for other prudent policy reasons.[28] The dispute settlement system was largely rebuilt in the 1970s. This was due mostly to pressure from the US, which responded to internal political pressure for a more open global economy by reversing its anti-legalistic posture.[29] The period marked the adoption of 1979 Understanding[30] which established several basic guidelines with the goal of 'improving and refining' the dispute settlement process.[31] A total number of thirty-two cases were filed during these years. The 1980s were a decade of contrast.[32] While one hundred and fifteen complaints were filed resulting in forty-seven decisions by panels, the US once again began to rethink its legalistic approach to dispute settlement. Worried by domestic concern over a mounting trade deficit and frustrated by the unwillingness of trading partners to open markets in a reciprocal fashion, the US often turned to unilateral means of dealing with perceived violations of the trade order.[33] The 1990s marked a period of speculation for the conclusion of the Uruguay Round of Multilateral Trade Negotiations. As a result the entire process of dispute settlement from consultation to the adoption of the reports was delayed in almost every case.

### 2. *Constitution of Panels*

Panel members are proposed by the Director-General of the GATT and not by the parties. In the beginning they were drawn from the

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26. Ernst-Ulrich Petersmann, "The EEC as a GATT Member — Legal Conflicts between GATT Law and European Community Law", in Meinhard Hilf, et al (eds.), *The European Community and the GATT* (1986), pp.23-26.
27. Robert E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (1993), pp.12-13.
28. Jackson, note 5, p.93.
29. Nicholas, note 25, p.398.
30. Note 12.
31. Hudec, note 27, p.210.
32. Nicholas, note 25, p.398.
33. Hudec, note 27, pp. 13-14.

rmanent delegations to GATT, but from the 1979 Understanding wards, the idea came up to include also non-governmental i.e. lependent, members in panels. And as a matter of practice citizens of e of the parties were not included in the panels. A panel may include ee or five members. In the 1979 Understanding[34] and also in practice ere is a clear preference for three-member panels. Three-member oups quite naturally work for mutual understanding, for consensus d for compromise. It is difficult to have a majority and minority in ee-member panels.[35] Each panel is assisted by, on the one hand, an ficial of the Secretariat to act as the panel's Secretary, and a presentative of the GATT's legal department, on the other. The task the former is to maintain contacts with the parties and at a later stage prepare the factual part of the panel's report, the task of the latter is advise the panel on points of law and to help in the drafting of the dings. Panels are instituted on the basis of so-called Standard Terms Reference.[36] This means that the panel is to act upon the unilateral quest of the complaining Party and that the panel itself is at liberty to amine this complaint in the light of the relevant provisions of the ATT, so that there can not be easily an *ultra vires* in GATT panel oceedings.[37] The GATT practice required that the request be in writing d give reasons for the request. The failure to raise an issue or to vance a particular objection to the impugned measure has resulted in respondent's successful objection to its consideration by the panel.[38]

### 3. Working of Panels

The rules of procedure provide for two rounds of written submissions, ch one followed by an oral hearing. Third parties may make known eir opinion if they have declared their interest when the panel was

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Note 12.

There is only one example of an individual opinion on record and this relates to a five-member panel. See, Pierre Pescatore, "The GATT Dispute Settlement Mechanism. Its Present Situation and its Prospects", *Journal of World Trade*, vol. 27 (1993), p.9.

'To examine in the light of the relevant GATT provisions complaint as formulated by the complainant Party and 'to make such findings as will assist the Contracting Parties in making the recommendations, or in giving the rulings as per Article XXIII'.

Pescatore, Note 35, p.10.

See, EEC- *Quantitative Restrictions Against Imports of Certain Products from Hongkong*, BISD, 30 S/129; *Canada-Administration of the Foreign Investment Review Act*, BISD, 30 S/140, p. at 158, para. 5.3; *United States-Denial of Most Favoured Nation Treatment as to Non-Rubber Footwear from Brazil*, BISD, 39 S/128. However, it does not appear from GATT practice that there is international trade law equivalent to the doctrine of acquiescence or laches.

instituted by the Council. As early as possible, the draft of the descripti part of the panel report is communicated to the Parties. The pane own deliberations take place confidentially though in an informal wa Hearings take place in a mode of diplomatic exchange, not in the ten atmosphere of court proceedings. The first meeting of the panel tak place before the first oral hearing to identify the problems to be solv and the points to be cleared up, which in turn inspires questions to raised at the hearing, either by the chairperson or by the other pan members. As far as applicable law is concerned, the panel reports ma be established by the standards of what is known as 'GATT law' or b the standards of international trade law, or by the international law general. Standard Terms of Reference call the panels to resolve disput without making reference to some principles which must be importe into GATT from outside.[39] In general, the GATT panels followed Vien Convention's[40] general rule and supplementary means[41] of interpretatio without elaboration. But this general practice is not without exceptions. Nevertheless, the interpretative notes have played an important role i many panel reports.[43] Another source of interpretative guidance wa the body of decisions by the Contracting Parties, the chairman thereo or a ruling from the Director-General.[44] Yet another source of guidanc was the records of negotiation, committees and working groups create by the Contracting Parties.[45] While there was no doctrine of *stare decisi* or precedent in GATT dispute settlement and each panel was free t render its decision based on the facts and law as it saw them, GAT panels frequently looked to the decisions of previous panels. Whil they did not 'apply' them in the common law sense, they adopte

39. See, Pescatore, Note 35, p.12.
40. On Law of Treaties 1969. *ILM*, vol.8 (1969), pp. 684-85.
41. These include Annexes, in addition, to the main body of the General Agreement. Fo instance, Annex 1, entitled Notes and Supplementary Provisions (which consolidate a series of agreed interpretations of words and phrases in the General Agreement has been an important source of guidance to GATT panels. By virtue of Articl XXXIV, these Annexes were made an integral part of the Agreement.
42. See, EC-*Value Added Tax and Threshold*, BISD, 31 S/254; United States– Restrictions on Imports of Tuna, BISD, 39 S/155.
43. *Canada—Restrictions on Ice-cream and Yoghurt*, BISD 36 S/68; *Japan—Restrictio on Imports of Certain Agricultural Products*, BISD, 35 S/155.
44. *United States—Denial of Most-Favoured-Nation Treatment as to Non-Rubbe Footwear from Brazil*, BISD, 39 S/128.
45. In *New Zealand—Anti-Dumping Duties on Finnish Tractors*, the panel found suppo for New Zealand's position the meaning of the term 'industry' in GATT Article in the Report of Experts on Anti-Dumping and Countervailing Duties, BISD, 8 145, para.18.
46. *EC-Restrictions on Imports of Dessert Apples-Complaint of Chile*, BISD, 36 S/9 at p. 126, paras. 12.8-12.9.

soning that they considered to be persuasive.[46] Finally, the GATT nels frequently referred to the negotiating history of a particular vision in order to ascertain the intent and the purpose behind it.[47] wever, this practice of purposive interpretation, though present in er panel reports, has not been a consistent feature of GATT isprudence.[48] Burden of proof *prima facie* lies on the complainant,[49] it varies according to the nature of the complaint.[50] GATT process not contemplate that oral testimony be given, the evidence was in form of documentary evidence or simply asserted as fact[51] in oral written submissions.[52] 1979 Understanding required the panels to

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*United States—Measures Affecting Alcoholic and Malt Beverages*, BISD, 39 S/206, p.272, para 5.11.

Christopher Thomas, "Litigation Process under the GATT Dispute Settlement System-Lessons for the World Trade Organization", *Journal of World Trade*, vol. 30 (1996), p.66.

*Canada—Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, BISD 39 S/27, pp.74-5.

'violation', 'non-violation', and 'situation complaints'. See, Article XXIII of the General Agreement.

Panels have admitted evidence in the form of texts of national laws and regulations, written statements of government officials, legislative studies, legislative history, negotiating documents, legal opinions on the constitutionality of government action etc.

GATT panels frequently scrutinized Contracting Parties' attempts to justify their measures either under a specific exception or under Article XX. With respect to the General Exception's clause, panels consistently found that once a breach of GATT rule has been established, the onus shifted to the Contracting Party seeking to invoke an exception. A disputant cannot justify a measure inconsistent with another GATT provisions as 'necessary' if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT measures available to it. (See, United States - Section 337 of the Tariff Act of 1930). Similarly, where a measure consistent with GATT provisions is not reasonably available, the disputant must prefer a measure which is least inconsistent. A measure does not become necessary simply by making it party of a scheme which contained elements that are necessary. The panel, in such cases, applied the doctrine of severability. See, *supra*, note 25, p. 393. Hence, it is no defence that the complainant had not complained in a timely fashion (See, EEC-note 38). Secondly, it was no defence that other Contracting Parties engaged in the same or similar practices as that which was being challenged. (See, *Japan—Restrictions on Imports of Certain Agricultural Products*, BISD, 35 S/163, p.241, para. 5.4.1.3); Again, the fact that the Contracting Parties have been fit to address an issue in multilateral trade negotiations underway at the time of a proceeding has not assisted a Party in defending its action. (See, *EC—Regulation of Imported Parts and Components*, GATT BISD, 37 S/132); and finally, socio-economic considerations that might mitigate in favour of a less rigorous interpretation of GATT obligations have been rejected as a defence (See, above, Japan—Agricultural Products). See also, the practice of the European Court of Justice in the implementation of Council's Directives.

give expression in each case to the rationale underlying their findin which calls for some kind of legal reasoning. While the panel repo are well drafted in a standard form in accordance with the modern practi of tribunals, however, unlike courts, there is no formal end to the panel decision process. This explains why panel reports have no specific dat Once the report is ready, the chairperson will call the parties and ha the reports over to them. Even at this stage, the Parties are free to agr on a mutually acceptable solution of dispute.

### *4. Adoption and Outcome of Panel Reports*

Panel reports after being circulated[53] to all Contracting Parties a customarily adopted by consensus.[54] Panel reports if approved by th Contracting Parties convening as Council, must be adopted in thei entirety. Partial adoption of a panel report is prohibited.[55] There is n appeal against formally adopted panel reports.[56] In violatio complaints,[57] the Contracting Parties recommend that the losing Part bring the administrative measures found to be inconsistent with th GATT provisions into conformity with the GATT. In non-violation[5 complaints Parties were asked to consider ways to eliminate th impairment of benefits to the complaining Party with a view t reinstating the balance of benefits.[59] Recommendations are to b implemented within a reasonable period of time.[60] Compensation i provided for as a temporary measure[61] under strict conditions, e.g. onl if the immediate withdrawal of the measure is impracticable.[6 Implementation of recommendations is subject to multilatera surveillance and the Council is required to review periodically actio

53. Panels have the task of presenting the GATT Council with a reasoned model fo solution, not that of resolving the issue on their own authority. See, Pescatore, not 35, p.13.
54. Absence of a negative vote by those who are present and voting, i.e., 'positiv consensus'.
55. For exception see, *Japan-Agriculture Products*, note 52.
56. For exception see, *Spain — Measures Concerning the Domestic Sales of Soyabea Oil, in Komuro*, note 11, p. 22.
57. Article XXIII (1) (a) of the General Agreement.
58. Article XXIII (1) (b) of the General Agreement.
59. See, the panel reports on *EEC—Payments and Subsides paid to Processors an Producers of Oil-Seeds and Related Animal-Feed Proteins*, adopted on 25 Januar 1990, L/6627, BISD, 37 S/86.
60. 1979 Understanding, para. 22 BISD 26 S/214.
61. Annex to the 1979 Understanding.
62. *Ibid.*

ken pursuant to recommendations.[63] Retaliation is a remedy of last sort which the complaining Party is entitled when the offending Party ils to implement the recommendations of the Contracting Parties.[64] etaliation should be authorized by the Contracting Parties and the ilateral retaliation without the GATT's authorization is prohibited. here is no self-judging right of retaliation, rather these measures may e authorized only if, in the view of the Contracting Parties, 'the rcumstances are serious enough to justify such action'. Unlike the ithdrawal of concessions under Articles XIX and XXVIII, which is quired to be 'substantially equivalent' to the delinquent measures, e suspension of concession under Article XXII (2) need not be quivalent but only 'appropriate'.

### D. Special or Additional Mechanisms[65]

These procedures in contrast to the unified provisions under Articles XII, did not adopt a consistent approach even among special ocedures *inter se*. For instance, Anti-dumping Code gives priority[66] recourse to its own dispute settlement procedure before Parties can ail themselves of any rights which they have under the GATT. It ust be emphasized that if a Party requests for the establishment of a nel under one mechanism it forfeits its right of conciliation under other dispute settlement mechanism in cases where both mechanisms ply.[67]

### E. Limitations of the GATT Regime

Panels have been the core tools of dispute settlement procedure. owever, case-law reveals that establishment of a panel was sometimes layed because of resistance by the respondent Party as a reluctant rty could block the Council decision to establish a panel.[68] Second,

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. If the recommendations are not implemented within a reasonable period of time, complaining Party may ask the Contracting Parties to make suitable efforts with a view to finding an appropriate solution. See, para 22 of the 1979 Understanding supplementing Article XXII and XXIII of the General Agreement.

Article XXIII (2) of the General Agreement.

These include Agreements, such as the Anti-dumping and Subsidies.

The same priority is to be found in Customs Valuation and Standard Codes.

One dispute between Japan and EC resulted in a panel under Article XXIII. Japan later requested conciliation under Article 15(3) of the Anti-dumping Code, but was denied. See, Komuro, note 11, p. 26

To accelerate the establishment of a panel, the 1989 Understanding affirmed the right of a complaining Party to have a panel process within a time-bound schedule. See, paras. C (2) and F (a)

panel process has been accused of lacking transparency, delays[69] and bias[70] inherent in the use of governmental officials as panelists.[71] Unlike judgments, panel reports are persuasive, not decisive documents. Their objective is to convey the opinion of the Council, not to decide directly the issue and for this reason it is not possible to deduce from the existing reports any choherent system of GATT principles and rules. It is a legal patchwork — legal dots on a large canvas which do not yet permit the perception of a structured picture.[72] Further, the highly injurious effects of the consensus rule[73] in the Council have been one of the foremost defects in the GATT dispute settlement procedure. The practice of blocking panel reports, as distinct from the practice of non-adoption, considerably weakened the functioning of GATT dispute settlement.[74] In addition, lack of an effective enforcement mechanism, political motivation or the stagnation of negotiations between Parties over how to secure compliance were the reasons for delay in implementing recommendations made by the Council. The sanction beneath a retaliatory remedy[75] in the presence of the consensus rule,[76] makes the Council handicapped on the one hand and leaves the door unguarded for unilateral use,[77] on the other. Second, the extent of measures to be

69. For an opposite view see, Ernst-Ulrich Petersmann, "Strenthening the GATT Dispute Settlement System", in Petersmann and Hilf (eds.), *The New GATT Round of Multilateral Trade Negotiations: Legal and Economic Problems* (1980), p.330.

70. Allegation of bias seemed to disappear ever since the 1984 Decision introduced the concept of a roaster of non-governmental panelists.

71. William J. Davey, "An Overview of the General Agreement on Tariffs and Trade", in Pescatore, Davey and Lowenfeld, *Handbook of GATT Dispute Settlement* (1991), p.73

72. Pescatore, note p.13. He says further '...to be frank the hope of every panel is that this (a voluntary settlement of dispute following the panel report is handed over to Parties) will not happen because in this event the report will be completely lost and nobody will know on what terms and on the basis of what reasons the Parties have found their last-minute agreement. They might either have intended to follow the panel' suggestions, but it might also be that they agree in order just to avoid the panel report being revealed and becoming a legal authority'.

73. It has nowhere defined in the GATT but was understood to mean that no delegation advanced its objections to a text or attempted to prevent its adoption.

74. Komuro, note 11, p.32. The GATT was unable to overcome the shortcomings of consensus rule although Article XXV (4) permitted the Council to adopt panel reports by a majority rule. See, the 1982 Decision.

75. Authorized once in *United States — Import Restrictions on Dairy Products*, against Netherlands in 1952. It was adopted with both the parties abstaining from voting.

76. Since no Contracting Party made reference to the practice of a disputing Party intervening in its own case as a judge with a final say. Hence, 1989 Decision confirms the practice in this regard.

77. *EEC—Citrus Products Case*, where the US took unilateral retaliation without the Council's authorization.

taken in retaliatory action defies definite remedial determination in every case.

## IV. WTO DISPUTE SETTLEMENT MECHANISM

### A. From Havana to Marrakesh: the GATT Legacy

The DSU adheres to the principles for the management of disputes applied under Articles XXII and XXIII of the GATT 1947 along with their supplementary rules.[78] Further, WTO is guided by the decisions, procedures and the customary practices followed by the Contracting Parties and panels.[79] Added to this, the new regime is a central element in providing 'security and predictability' to the multilateral trading system..., serves to 'preserve the rights and obligations of the Members'[80] and '... to clarify provisions in the covered agreements in accordance with 'customary rules of interpretation of public international law...'[81]

### B. Innovations

The DSU offers a means for the settlement of disputes among members that is unique in international agreements.[82] This uniqueness unfolds in several ways: First, General Council to function as the DSB which establishes panels, adopts panel and Appellate Body reports, maintains surveillance of implementation of rulings and recommendations and authorizes retaliation under the covered Agreements.[83] Second, while General Council continues with the practice of 'positive consensus',[84] DSB is required to take decision — from the

78. Article 3 (1) of the DSU.
79. Article XV (1) of the WTO Agreement.
80. This means that the 'recommendations and rulings of the Dispute Settlement Body (the "DSB") cannot add to or diminish the rights and obligations provided in the covered agreements'. See, Article 3 (2) of the DSU.
81. The principle would encourage the development of panel adjudication in the sense that 'it represents a significant drift away from the pre-WTO approach'. See, Palitha T.B. Kohona, "Dispute Settlement under the World Trade Organization—An Overview", *Journal of World Trade*, vol. 28, no. 2 (1994), pp.23-47. The instant provision does in no way derogate the exclusive responsibility of Ministerial Conference and the General Council to give authoritative interpretation of covered Agreements including DSU. See, Article 3 (9) of the DSU.
82. See, para (9) of the Declaration of the first Ministerial Meeting of the WTO, held in Singapore December 9-13, *International Legal Materials*, vol. 36 (1997), p.222.
83. Article IV of the WTO Agreement and Article 2 (1) of the DSU
84. Footnote 1 appended to Article IX (1) of the WTO Agreement. *The Results of the Uruguay Round of the Multilateral Trade Negotiations—The Legal Texts* (the "GATT, 1994"), p.11

establishment of a panel to the authorization of retaliation-without a 'negative consensus'.[85] Hence, decisions of the DSB are automatically adopted without unanimous opposition. In other words, each decision will be taken without the veto of the offending party if at least one Member supports it.[86] Third, the DSU imposes stringent time-limits for each stage of the dispute settlement procedure. Fourth, disputing parties are not prevented from publicly voicing their opposition or airing grievance. Fifth, a three-tier[87] retaliation[88] is authorized under the multilateral framework of the DSB as a last resort leading to withdrawal of the delinquent measure. However, the DSU prefers[89] a mutually acceptable solution. Sixth, the DSU created an Appellate Body to review panel rulings. Since the overall aim of the WTO dispute settlement mechanism is to secure a positive[90] solution to a dispute, good offices or conciliation may be resorted to at any time, even after the commencement of the panel process. And, finally, the DSU provides for arbitration as an 'alternative means of disputes settlement' which 'can facilitate the solution of certain disputes that concern issues that are clearly defined by both the parties'.[91]

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85. Article 2 (4) of the DSU and its accompanying footnote. See also Articles, 6,16,17,21 and 22 of the DSU.
86. Because the panel procedures, up to the adoption of the panel or Appellate Body Reports, will not be interrupted by a veto of the disputing party unless a mutually agreed upon solution is reached half-way, or conciliation or good offices are resorted to on the way by disputing parties. Consequently, disputing parties participation in the DSB would scarcely influence the decision-making of the DSB under the negative consensus rule since the winning party would always support the decision.
87. Same sector, other sectors under the same agreement and another covered agreements. See Articles 22 (1) (a) (b) (c) respectively of the DSU.
88. Article 3 (7) of the DSU. Permitted if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure in question.
89. Article 3 (7) of the DSU.
90. The term is susceptible to various interpretations sometimes incompatible with one another. For instance, if it indicates a non-coercive order, then it remains to be seen how it secures compliance of big entities' obligations in the system to protect the rights of smaller Members to ensure security and predictability in the multilateral trading system. If it means, on the other hand, the maintenance of *status quo* with respect to rights and obligations of Members, then it seems difficult to understand how it strives to further the 'positive' goals of the Organization. See Preamble of the WTO Agreement.
91. Article 25 (1) of the DSU.

### C. The Structure of the DSU: 'A Hierarchy of Responses'

#### *1. Consultation*

The existence of an alleged nullification or impairment is not a pre-
ondition for initiating consultation under the DSU. This may proceed
ith respect to measures affecting the operation of any covered
greement within the territory of a Member.[92] Against the request for
ich consultation, a response should be made, unless otherwise mutually
greed within ten days and consultation should commence within thirty
ays of the request. If these time-limits are not observed, then the
omplainant party may proceed directly to request the establishment of
panel.[93] Notification of request for consultations are given in writing
ith reasons including identification of measures at issue and indicating
s legal basis to the DSB. Consultations are confidential. [94] Whenever a
ird party considers that it has a 'substantial trade interest', such party
ay join consultations.[95] The DSU is silent whether consultations should
recede the panel process. However, it may be implied in Article 3 (3)
nd 3 (7) of the DSU.

#### *2. Good Offices, Conciliation and Mediation*

This is a voluntary[96] facility available to disputing parties which
ay be requested at any time and begin at any time and may continue
hile the panel process proceeds. Director-General of the WTO is
ntrusted to offer good offices, conciliation and mediation which may
e terminated[97] at any time.

#### *3. Panel Process*

A panel may be requested automatically on request, [98] on standard
rms of reference[99] unless otherwise agreed by the parties.[100] In the

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. Footnote 3 to Article 4 (3) of the DSU.
. Article 4 (3) of the DSU.
. Article 4 (4) of the DSU.
; Article 4 (4) (1) of the DSU.
. Article 5 of the DSU.
. The DSU does not indicate who may terminate the procedures for conciliation. '...it would not seem reasonable for the party which did not invoke this provision to be able to exercise a unilateral right to bring the informal proceeding to an end.' See. Kohna, note 81, p.34.
Article 6 (1) of the DSU.
In *India — Patent Protection for Pharmaceutical and Agricultural Chemical Products*, the Appellate Body on India's appeal held that Article 60 (1) of TRIPS Agreement was not within the Panel's terms of reference. See, WTO website.
0. Article 7 (1) of the DSU.

absence of an agreement to the contrary, panelists should not be citizens of the disputing parties or third parties.[101] In case of multiple complaints for the same subject matter, one panel will be established.[102] Third parties having a substantial interest in a matter before the panel are permitted to join.[103] Functions [104] of panels are to 'assist' the DSB in discharging its responsibilities under the WTO. Hence, panels' tasks are not limited to the adjudicative field, but also reach into the area of conciliation 'if it assists' the DSB. A panel may review its interim report if parties extend their comments. If no comments are submitted within a week, the interim report shall be considered the final panel report. Deliberations are held in confidential atmosphere. However, disclosure of interim report admits of certain degree of transparency. Panels have a right to seek information from anything within the WTO jurisdiction and a right to consult expert groups.[105] Drafting of reports is done confidentially. However, where parties reach a solution, the report will be confined to a brief description of the case and the settlement. In case of 'violation' complaints, panels recommend an offending party to bring the measure into conformity with that Agreement and in 'non-violation'[106] complaints, a mutually satisfactory adjustment is recommended.[107] Panels cannot add or diminish rights and obligations provided in covered agreements. Panel

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101. Article 8 (3) of the DSU.
102. Appendix 3 to the DSU. See also Article 9 of the DSU. See the Panel report submitted in *United Kingdom—Customs Classification of Certain Computer Equipment*. See, WTO website.
103. In *Argentina — Certain Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, the EC and India reserved their third party rights, to the dispute. The panel Report is appealed and the decision of the Appellate Body is awaited. On third party rights, see also the Panel report submitted on 5 February 1998 in *European Communities—Customs Classification of Certain Computer Equipment*. See, WTO website.
104. Note 100. For working procedures see, Appendix 3 to the DSU and Rules of Conduct for the Understanding on Rules and Procedures Concerning the Settlement of Disputes (the "Rules of Conduct"), adopted on 3 December 1997, *ILM*, vol. 36 (1997), pp. 477-85
105. This provision was inserted at the request of the US because of its dissatisfaction with the Panel report on *Tuna* case. See, *ILM*, vol.33 (1994), pp.842-903. This report was criticized for not taking into account the opinion of experts on ecological matters. Expert groups though independent of governments are however dependent on panels. They also extend advisory opinion. See, Appendix 4 to the DSU. *Supra*, note 85, p.433
106. See, US complaint in *Japan — Measures Affecting Consumer Photographic Films and Paper* now under Panel consideration. See, WTO website.
107. Article 26 of the DSU. The burden of proof depends upon the nature of complaint. See, the Appellate Body report on *European Communities — measures Affecting Meat and Meat Products (Hormones) and European Communities — Measures Affecting Livestock and Meat (Hormones)*, on WTO website.

reports are adopted by the DSB within sixty days unless appealed.

### *4. Appellate Review*

A standing Appellate Body composed of seven members hears appeals against the panel rulings as between the disputing parties. Third parties having substantial interest may not appeal but may make written submissions. It is outside the power of the Appellate Body to decide on the suitability of a request for appeal. However, the Working Procedures[108] provide that the Appellate Body may dismiss an appeal where a participant fails to file a submission within the stipulated time.[109] An appeal is strictly limited to the legal issues[110] in the panel reports and their legal interpretations.[111] The Appellate Body functions on the basis of the collegiality concept.[112] In its first

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108. For Appellate Review, adopted on 15 February 1996, see, *I.L.M.*, vol.35 (1996), pp.495-519. Stressing the central concern of Appellate Body Members while framing the working procedures, the chairman of the Appellate Body emphasized: 'the need for vigilance in protecting the basic rights of all parties; the need for rotation in the establishment of division along with the advantage of collegiality; the need for independence and impartiality in our decision making; the need for strict adherence to the Rules of Conduct in our endeavours; and, the need for constant and conscientious compliance with both the letter and the spirit of the DSU and the other Covered Agreements of the WTO in all our efforts to strengthen the multilateral trading system'. See Gustava Nogueira, "The First WTO Appellate Body Review: United States — Standards for Reformulated and Conventional Gasoline", *Journal of World Trade*, vol. 30, no. 6 (1996) pp.5-29.

109. Article 29 of the Working Procedures for Appellate Body, note 108, p.511

110. 'The legal issue under appeal was a most controversial one, e.g. interpretation of Article XX (g)'. See, Nogueira, note 108, pp.8-9. In *Brazil—Measures Affecting Desiccated Coconut; United States — Measures Affecting Imports of Woven Shirts and Blouses; and Canada — Certain Measures Concerning Periodicals*, the Appellate Body negatived the pleas of Philippines, India and Canada and upheld the findings and legal interpretations developed by Panels.

111. In *Canada — Certain Measures Concerning Periodicals*, the Appellate Body reversed the Panel's finding that Part V.I of the Canada's Excise Act is inconsistent with the first sentence of Article III.2 of GATT 1994. The Appellate Body further concluded that Part V.I of the Excise Act is inconsistent with the second sentence of Article III.2 of GATT 1994. The Appellate Body also reversed the Panel's conclusion that Canada's "funded" postal rate scheme is justified by Article III.8 (b) of GATT 1994. Similarly, in *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, the European Communities notified its intention to appeal certain issues of law and legal interpretations developed by the Panel. The Appellate Body mostly upheld the Panel's findings, but reversed the Panel's findings that the inconsistency with GATT Article XIII is waived by the Lome' waiver, and that certain aspects of the licensing regime violated Article X of GATT and the Import Licensing Agreement. See, WTO website.

112. Article 4 (3) of the Working Procedures for Appellate Review, note 108, p.504

review case[113] the Appellate Body found two US omissions e.g. consider cooperation with Venezuela and Brazil in mitigating t administrative problems relied on as justification by the US, and to ta into account the effect of statutory baselines on foreign refiners. It mu be reiterated that the adoption of Appellate Body reports are done negative consensus by the DSB.[114]

### D. Implementation of Recommendations

Implementation is based on the principle of prompt compliance an an obligation on losing party to notify the DSB of its intention with respe to implementation. If immediate compliance is unreasonable, the losin party is given reasonable time.[115] In an absence of a mutually agree solution,[116] the first objective of the dispute settlement mechanism usually[117] to secure the withdrawal of the measures concerned. Withdraw may take time through any one of the several ways: First, if immediat withdrawal is impracticable, compensation is resorted to as a temporar measure pending withdrawal; Second, if there is either disagreement o satisfactory compensation or non-implementation (i.e. withdrawal) o recommendation within the reasonable period of time, the complainin party may request authorization from the DSB to take retaliation.[118] Third if the losing party either objects to the level of suspension (throug retaliatory measures) proposed or claims that the principles and procedure have not been followed when a complaining party has requested cross retaliation, recourse may be had to a binding arbitration.[119]

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113. Note 105.
114. This means that reports are adopted even if only one Member supports it. Since th winning party would always support the adoption, there is no question of panel c the Appellate Body reports, as the case may be, shelved for want of adoption.
115. Article 21 (2) of the DSU.
116. Which may not be the same as withdrawal.
117. This indicates that the DSB is free to recommend another measure or it may be th pending withdrawal any measure may be taken in pursuance thereof.
118. Like compensation, retaliation is also a temporary measure which may take any on of three forms, such as parallel, cross-sector and cross-agreement. Although the latt was opposed to by many countries during the Uruguay Round, it was incorporate at the request of the US. However, unilateral retaliations are not permitted. See, 'Speci 301: India Regrets US Decision', *The Hindu* (New Delhi), 2 May 1997, p. 4
119. It is a post-adjudication exercise, as distinguished from the adjudication exercise b panels and Appellate Body. It is binding and there is no question of appeal. In *Japa — Taxes on Alcoholic Beverages* and *European Communities — Regime for th Importation, Sale and Distribution of Bananas*, complainants applied for bindin arbitration to determine the reasonable period of time for implementation b respondents of the recommendations of the Appellate Body. Currently, India requesting for the same. See, "Buying time: India to appoint arbitrator on patents *Economic Times* (New Delhi), 16 March 1998, p.10

## E. Special Procedures under the DSU

### *1. Non-violation Complaints*[120]

The DSU directs panels or Appellate Body, as the case may be, to base their rulings in these cases based on two preconditions: First, the complaining party should present a detailed justification; and, Second, onus of proof is on the complainant to justify its allegations. Even if it has been established that there is an impairment and nullification, there is no obligation to withdraw the measure. However, panel or Appellate Body shall recommend that the Member concerned make a 'mutually satisfactory adjustment'. Should there be a failure to reach a satisfactory adjustment, the complaining party may request the authorization to suspend the application of concessions or obligations under the multilateral regime. [121] Compensation, in addition to being temporary, may be part of a mutually satisfactory adjustment as a final settlement of non-violation disputes.[122] Arbitration shall suggest ways and means of reaching a mutually satisfactory adjustment. But, such suggestions 'shall not be binding upon the parties.'[123]

### *2. Situation Complaints*[124]

In these cases complaining party is required to furnish detailed justification. DSU shall apply up to and including the point in the proceedings where the panel report has been circulated to the Members.[125] Panel reports are adopted by positive consensus.[126]

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120. Non-violation impairing measures include not only measures that do not conflict with dispositions of the GATT but also measures that, although infringing GATT provisions, are nevertheless, justified by exceptions to the GATT: e.t., Articles XX, XXV (5) and Article XXI. See also, Article XXIII (1) (b) of the General Agreement.
121. See Working Party report on *Australian Subsidy* case. Note 19.
122. Article 22 (1) of the DSU.
123. Article 26 (1) of the DSU.
124. Those contemplated pursuant to the provision under Article XXIII (1) (c) of the GATT 1994. See also Article 26 (2) of the DSU. In view of the very broad scope of application of violation complaints... there is hardly any need for additional situation complaints pursuant to Article XXIII (1) (c) of GATT 1994. Ernst-Ulrich Petersmann, *The GATT/WTO Dispute Settlement System. International Law, International Organizations and Dispute Settlement* (1997), p.175.
125. Procedures contained in the 1989 Decision apply.
126. To date no panel report has dealt with situation complaints. It is an open question as to what type of situations are at stake. It appears, however, that the attempt has been made to give the provision as broad a coverage as possible. In 1983 EEC requested it but did not pursue. For a comparable provision see, Article 62 of the 1969 Vienna Convention on the Law of Treaties. Note 40, p. 689.

### *3. Covered Agreements*

Special and additional dispute settlement procedures are provided for in certain covered agreements,[127] such as the Anti-dumping and Subsidies Agreements. The Anti-dumping Agreement has introduced special provisions regarding the standard of review for panels. The standard of review in Article 17 (6) of the Agreement shall, however, be reviewed after a period of three years with a view to considering the question of whether it is capable of general application. The Subsidies Agreement gives the Committee on Subsidies (the "CS") and the Permanent Group of Experts (the "PGE") a special role in dispute settlement. A panel may request the assistance of the PGE with regard to whether the measure in question is a prohibited subsidy,[128] and must accept the PGE's conclusions without modifications.[129] This marks a departure from the normal panel proceedings under the DSU. With regard to procedures for non-actionable subsidies, if consultations have not been successful, the requesting Member may request the CS to consider the matter which may make recommendations to the subsidizing Member.[130] If these recommendations are not followed within six months, the committee will authorize the requesting Member to take appropriate conter-measures. Here, no reference is made to the DSU. Needless to say that dumping and subsidies are among the major issues where the interests of the developing countries have been at stake. Protectionist spirit behind these procedures to find unilateral escape routes is bound to affect the credibility and viability of the multilateral trading regime.[131]

### *4. Least Developed Country Members*

DSU states that particular consideration shall be given to the special situation of least developed Member countries. To this end, Members

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127. Appendix 2 to the DSU. The competent bodies of Annex 4 Plurilateral Agreements may notify the DSB of any special or additional dispute settlement mechanism they agree upon.
128. See also, Article 31 and Annex I to the Working Procedures for Appellate Review. Note 108, pp. 513-15.
129. Article 4 of the Agreement on Subsidies and Countervailing Measures (the "SCM Agreement") See, note 84, p.267.
130. *Ibid.* Article 9, p.277.
131. Developing countries have begun to use multilateral procedures to settle disputes much more than in the past. See, in particular cases, such as *Brazil* v. *Mexico (Electric Power Transformers)*, 1991; *Malaysia* v. *Singapore (Plastic Resins)*, 1994; *India v. Poland (Tariff on Cars)*, 1994. As far as developing countries are concerned, key issues for the future include: disciplining regional trading blocs, harnessing the threat of self-judging protection and using the WTO dispute settlement procedure with uniformity and impartiality.

are required to exercise due restraint in raising matters under the dispute settlement procedures involving a least developed country. In case of nullification or impairment resulting from a measure taken by a least developed country, complaining parties must exercise due restraint in asking for compensation or seeking authorization for retaliation. In case where consultations have not produced a satisfactory solution, the Director-General or the chairman of the DSB shall, upon request of such country, offer its good offices, conciliation and mediation before a request for panel is made.

## V. ISSUES CONFRONTING DEVELOPING COUNTRY MEMBERS[132]

Three-fourth of the total membership of the WTO[133] comes from the developing countries. The rising membership may certainly evidence for rising confidence[134] of states in the Organization but increasing use of remedial regime of the WTO does not *ipso facto* mean increasing benefits[135] accruing to the developing countries.[136] The reform of the

132. Tariff reductions, quantitative restrictions, safeguards and anti-dumping, MFA liberalization and implementation of TRIPs, are some of the key issues ongoing in the WTO. Upcoming issues include: environment-labour standards, multilateral investment agreement, regionalism, free electronic commerce (free trade on Internet) and a new round of multilateral trade negotiations. The focus of this part of the paper is confined to identify issues pertaining to GATT/WTO law-both substantial and procedural, that arise out of the functioning of the dispute settlement mechanism.
133. 132 as of September 1997. Besides, there are 30 Observers. All Observers except Holy See, are negotiating to join the WTO.
134. '... this is reflected in the increased diversity of countries using it and in the tendency to resolve cases 'out of court' before they get to the final decision...' Renato Ruggiero, 7 April 1997. See, *Trading into the Future* (WTO, 1997), p. 3.4.
135. '... translating these multilateral trade rights into concrete trade advantages requires action by governments... But many such countries have found themselves poorly equipped in terms of institutions and human and financial resources dedicated to this objective'. See, UNCTAD/WTO Report 1996 on 'Strengthening the Participation of Developing Countries in World Trade and Multilateral Trading System', cited in note 134, p.5.6.
136. 'National laws and regulations of most developing countries, even where existing are still imperfect. They are usually less detailed than the multilateral agreements. Whereas, on the contrary, the national laws and regulations of the major developed countries are more detailed than the multilateral agreements'. UNCTAD, *Enhancement of the Understanding of the Implications of the New Rules Deriving from the Uruguay Round Agreements and their Follow-up, and Identification of where and How Developing Countries and Economies in Transition Concerned could be Assisted to: (A) Make Use of the Special Clauses of the Final Act Providing Differential and More Favourable Treatment; and (B) Implement and Benefit from the Commitments Undertaken*, TD/B/WG. 8/6, 15 November 1995, at p.4. See also, V. Jayanath, "India's WTO concerns", *The Hindu* (New Delhi), 22 November 1997, p 10

GATT was 'an attempt simply to reinforce some provisions of the original GATT without closing various loopholes that allow selective violation of GATT law in an *ad hoc* manner'.[137] Three years of functioning of the dispute settlement mechanism raises at least the following issues which need to be addressed more seriously if the Organization is to appear true to its stated objectives.[138]

## A. Representation of Parties

*In European Communities—Regime for Importation, Sale and Distribution of Bananas,*[139] the United States and Mexico opposed the presence of some private counsel appointed by Saint Lucia, another WTO Member. The Panel ousted the attorneys on the ground that they were not permanent government officials. The fact that the dispute is almost resolved does not lessen the gravity of a larger issue which remains: what is the basis of such an action by the Panel?[140] Neither the DSU nor the Rules of Conduct[141] shed any light on the subject. The first Appellate Body report[142] however held that WTO law is part of the body of public international law. Neither general international law nor WTO law contains any rule which would support such a course of events...[143] Members should be entitled to have their cases presented by whoever they wish. To confine legal representation to permanent government officials in practice is to reserve that advantage only for those

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137. Kendall Stiles, "Negotiating Institutional Reform: The Uruguay Round, the GATT and the WTO", *Global Governance*, vol. 2, no.1 (1996), p.145.
138. These include raising standard of living, full employment, sustainable development and to protect and preserve the environment. See, Preamble to the WTO Agreement, note 84, p.6. See also, the Singapore Ministerial Declaration, adopted on 13 December 1996, renewing its commitment to a fair, equitable and more open rule-based system, note 82, p.221.
139. WT/DS27 See, WTO website.
140. Article 24 of the DSU provides: 'At all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least-developed country Members'. Addressing a three-day seminar on international trade law organized by the International Law Association in New Delhi on 3 January 1998, the President K.R. Narayanan said: 'while there are issues in the various WTO agreements providing for special and differential treatment to developing countries, it is noticed that in practice many of them are not implemented in spirit if not in letter'. See, *The Hindu* (New Delhi), 4 January 1998, p.6
141. Note 104.
142. *United States - Standards for Reformulated and Conventional Gasoline*, adopted by DSB on 20 May 1996. See WTO website.
143. Rustel Silvestre J. Martha, "Representation of Parties in World Trade Disputes", *Journal of World Trade*, vol. 31, no. 2 (1997), p.83.

governments that can afford them.[144] The 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations is of a universal character, although not in force but reflects customary element. While a rule-based system may benefit developing nations, it also imposes a burden requiring trained personnel and resources to gather information and advance legal argument.[145]

### B. Adducibility of Evidence

As an established practice the burden of leading evidence lies on the complainant party. Problem arises where the respondent whose measure is being challenged controls evidence relating to the measure which may affect the complainant's ability to prove that the measure in question is inconsistent with the respondent's obligations. This happens when complainant wishes to challenge an anti-dumping measure but does not have access to the confidential information[146] on which the respondent's investigating authority based its determination. Inaccessibility of facts considered by the authority makes it difficult for a complainant to rebut the presumption of objectivity in respect of the evaluation of those facts by the authority.[147]

### C. Security Exceptions

Exceptions[148] seem to have been more controversial than the body

144. David Palmeter, "The Need for Due Process in WTO Process", *Journal of World Trade*, vol. 31, no. 1 (1997), p.53.
145. Kenneth W. Abbott, *Trade Remedies and Legal Remedies: Anti-Dumping, Safeguards and Dispute Settlement after the Uruguay Round*, Economic Development Institute, World Bank, June 1996, p.31.
146. '... Provision of such opportunities must take account of the need to *preserve confidentiality* and of the *convenience to the parties*' (emphasis added). See, Article 6 (2) of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994. Note 84, p.179.
147. 'If the establishment of facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned'. *ibid*, Article 17.6 (I), at p. 193. India terms EU's method of calculation of anti-dumping duties as 'unfair'. Following increase in anti-dumping cases and complaints from the industry, an anti-dumping division has been set up in the Ministry of Commerce. See. "EU, India to thrash out dumping", *Economic Times* (New Delhi), 16 March 1998, p.10.
148. See, in particular: The 1994 panel report on "United States — Import Restrictions on Tuna", note 105; The 1994 panel report on "United States — Taxes on Automobiles", *ILM*, vol. 33 (1994), pp. 1397-1460; and The 1996 panel and Appellate Body reports on "United States — Standards for Reformulated and Conventional Gasoline", *ILM*, vol. 35 (1996), pp. 274-300 and 603-34. Available also on WTO website

of general provisions governing the operation of multiateral trading system. One such exception enables a Member to take 'any action which it considers necessary for the protection of its essential security interests...'[149] Under Helms-Burton Acts of the US Congress, nobody in the world is authorized to 'traffic' in properties expropriated in 1959-60 by Cuba, that belonged to Americans (or, Cubans who later became Americans). This not only violates[150] Article XXI of the General Agreement but also raises the issue of interpretation[151] of the provisions of the covered agreements. Neither the texts of the WTO nor the disputes settled so far[152] explain as to what constitutes essential security interests. Dispute settlement panels have, in the past, actually applied early common law rules of statutory interpretation that exceptions to the General Agreement were to interpreted narrowly.[153]

### D. Rules of Interpretation

Article 3 (2) of the DSU seeks to clarify the existing provisions of those [covered] agreements in accordance with customary rules of interpretation of public international law. Even as there is no consensus[154] as to the precise meaning of these rules, the 1996 Appellate Body report on *United States—Standards for Reformulated and Conventional Gasoline*, noted that "Article 31.1 of the Vienna Convention forms of the customary rules of interpretation of public international law which the Appellate Body has been directed by Article 3 (2) of the DSU, to apply..."[155] The survey of the past GATT case-law on TREMs (Trade Related Environmental Measures) shows that there are still a large

149. Article XXI of the General Agreement on Tariffs and Trade 1994.

150. Brigitte Stern, "Can the United States Set Rules for the World", *Journal of World Trade*, vol. 31, no. 4 (1997), pp. 5-26

151. See, Kees Jan Kuilwijk, "Castro's Cuba and the US Helms-Burton Act, An Interpretation of the GATT Security Exemptions", *Journal of World Trade*, vol. 31, n.3 (1997), pp.68-83.

152. See, *United States - The Cuban Liberty and Democratic Solidarity Act*, currently under consideration by Panel although, on 25 April 1997, the Panel has suspended its work on EC's request. See, WTO website.

153. *Canada - Import Restrictions on Ice-cream and Yoghurt*, 36 Supp. BISD 68,84,89 (1989); *United States-Customs User Fee*, 35 Supp. BISD 245, 278 (1988).

154. Jackson, on the one hand, suggests that Articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969, represent a codification of customary rules referred to in the DSU. See, *supra*, note 5, p.88. Villigier, on the other hand, has identified five discrete methods of treaty interpretation predating the Vienna Convention and has concluded that Articles 31 and 32 represent an 'innovative scheme of interpretation rather than a codification of custom'. See, Mark E. Villigier, *Customary International Law and Treaties* (1985), pp. 327-28.

155. *ILM*, vol. 35 (1996), pp. 603-634.

number of legal and interpretative issues to be clarified in this field notably regarding GATT Articles III and XX and their relationship with the TBT and SPS (Sanitary and Phytosanitary Measures).[156] Further, to what extent Article 3 of the DSU is applicable to the TRIPS Agreement and other intellectual property rights conventions, e.g. the 1883 Paris Convention and 1886 Berne Convention, is not clear. Then, there is a need to clarify in some detail as to what precisely constitutes 'public interest' before a Member can properly apply safeguard measures to a product being imported into its territory.[157] The concession given to developing country Members in this regard does not sufficiently safeguard their interests being affected for reasons they have little control.[158] Finally, recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under the DSU and under the covered agreements. But it is nowhere defined as to what amounts to 'satisfactory settlement'. Mere recommendations to bring the offending measure into conformity with WTO law may turn out to be an ineffective remedy if the complaining and the offending countries continue to construe their WTO rights and obligations differently.[159]

## VI. CONCLUDING OBSERVATIONS

The smooth transition from GATT to WTO effected with the successful conclusion of the Uruguay Round seems to have belied the hopes of those in this part of the world who thought the Organization to be a panacea for all ills confronting the multilateral trading regime. In addition to what has been discretely observed heretofore, suffice it would be to mention here that the attempt to introduce juridical certainty in the dispute settlement procedure to secure unhindered compliance in conformity with tight deadlines, and the provision for remedies even in situations which disclose no manifest violation of any GATT/WTO norm,

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156. Petersmann, note 124, p. 136-7. A glance at the nature of cases brought before the WTO would reveal that while complaints from developing to developed countries involve old issues, such as subsidy and agriculture, most of the disputes where developed countries are complainants are on new issues: TRIPS, TRIMS and GATS. See, Pretty Elizabeth Kuruvila, "Developing Countries and the GATT/WTO Dispute Settlement Mechanism", *Journal of World Trade*, vol. 31, no. 6 (1997), pp. 171-208.

157. Article 3 (1) of the Agreement on Safeguards.

158. *Ibid*, Article 9. Frequent slumps in domestic currencies following deteriorating external economic situations, falling prices of primary products, rising demand for food and other necessities in the developing countries can hardly justify these measures even though statistical assessment would not prohibit such a recourse.

not only embraces the debate between 'hard law ' and 'soft law' as to the Members' obligations *inter se*, but also imparts the DSU an exemplary *sui generis* character—a blend of legalism and pragmatism leaning generally in favour of pragmatism — unknown to the law of international organizations. This inbuilt flexibility embedded in textual phraseology, often imprecise, has the potential to impede the stated goal[160] of multilateral trading system. The mere fact that the discretion of accepting panel/Appellate Body reports no longer remains with the Members, does not *ipso facto* secure compliance from major trading entities, such as the Quad[161] in respect of their obligations incurred thereunder. While the WTO seeks to introduce greater multilateral curbs on unilateral trade sanctions in return for a stronger multilateral dispute settlement mechanism, the resort to new forms of protection and extraterritorial measures continue to threaten the effectiveness of the DSU and the viability of 'a system of rules dedicated to open, fair and undistorted competition.'[162]

The creation of the WTO as an institution of multilateral trading system coincides with the two dominant trends of present-day world order: globalization and regionalization. The degree of success and effectiveness of the WTO will largely depend upon the extent to which it maintains and extends multilateral cooperation while preventing large economies from pursuing trade problems outside the new trading regime.

159. Note 156, p.140.

160. "... Sustainable growth and development for the common good..." See, the Singapore Ministerial Declaration, note 82, p.221

161. Canada, the European Communities, Japan and the United States.

162. Note 134, p.1.5

# FROM BERLIN TO KYOTO : A GASEOUS MIX OF MISSED OPPORTUNITIES — A DEVELOPING COUNTRY AGENDA*

LUTHER M. RANGREJI**

## I. BACKGROUND

The threat of climate change has come a long way from the stage of individual scientific efforts to being recognized as a global problem. Further impetus to the work of scientists and non-governmental effort was provided when the United Nations Environment Programme (UNEP) and the World Meteorological Organization (WMO) established the Intergovernmental Panel on Climate Change (IPCC) in 1988.[1] With an expanded mandate to assess the state of the existing knowledge about climate system and climate change, socio-economic impacts of climate change and possible strategies for abatement, the IPCC after painstaking peer review confirmed the scientific basis for climate change.[2] The science of climate change though welcomed by the Alliance of Small Island States (AOSIS)[3] was hotly contested by the fossil fuel producing states which demanded fair and just compensation under traditional international law for reducing oil production.[4] It is against this backdrop of scientific uncertainty that the United Nations General Assembly resolution 43/53 of 14 September 1988, determined climate change as a common concern of mankind and placed the item "protection of climate change for present and future generations" on its future agenda.

Despite the growing international consensus on the issue, the Second World Climate Conference 1990 witnessed a demand by the less industrialized countries of the South for a Special Environmental Fund,[5] wherein climate change would be seen as a larger component of the

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1. From Svante Arrhenius's theory of global warming (1896) to the Villach Conference (1985) scientists have continued efforts towards consensus building on the issue.
2. IPCC First Assessment Report, 31 August 1990. Brazil, however, insisted that the IPCC reflected "technical assessment of experts rather than government positions".
3. General Assembly resolution 44/206 of December 1989 and the Male Declaration on Global Warming and Sea Level Rise issued at the Small States Conference, Male, Maldives, 18 November 1989.
4. See *Chorzow Factory (Indemnity)* Case, *PCIJ. Series A. No. 17*, 1928, p. 29.

development issue.[6] Developing countries were also successful to sh the climate change agenda to the General Assembly, a larger deliberati forum than the IPCC-WMO-UNEP combine. In pursuance of the negotiations, the General Assembly established the Intergovernmen Negotiating Committee (INC).[7] The INC held five sessions before t United Nations Framework Convention on Climate Change was adopt in May 1992 at UNCED, Rio de Janerio. It has nearly 170 states signatory Parties.

The United Nations Framework Convention on Climate Chan (hereinafter UNFCC), a package deal[8] convention, was adopted wi universal participation by states. For a 'framework' convention, t UNFCC provides a graduated, albeit fractured set of commitments; wide range of guiding principles, a financial mechanism, which includ commitments by developed countries to provide additional financi resources and transfer of technologies to meet the incremental cos incurred by developing Country Parties. The institutional set up include subsidiary scientific bodies for implementation and technological advi and the conference of parties as the highest decision making bod Besides innovative techniques of joint implementation are provided fo to achieve UNFCC objectives.

The UNFCC presents a 'controvoluted'[9] set of general and specif commitments and speaks rather loosely of time framed targets. Unlil a typical environmental treaty adhering either to soft law or hard la approach, the framework convention/protocol is a combination of th two, as Article 7 of the UNFCC provides for adopting protocols, strengthen the convention process.

5. Precedents of this nature exist under the International Convention on the Establishme of an International Fund for Compensation for Oil Pollution Damage and the Montre Protocol on Substances that Deplete the Ozone Layer.

6. The International Conference on Global Warming and Climate Change: Perspectiv from Developing Countries, New Dlehi, 21-23 February 1989 called for increas funds for financing afforestation policies and transfer of benign renewable ener technologies.

7. General Assembly resolution 45/212 of 21 December 1990. See Daniel Bodansk "Prologue to the Climate Change Convention", in Irving Mintzer and J.A. Leona (eds), *Negotiating Climate Change: The Inside Story of the Rio Conventi* (Cambridge, 1994), pp. 45-74.

8. Roy S. Lee, "Multilateral Treaty Making and Negotiation Techniques : An Appraisal in Bin Cheng and E.D. Brown (eds), *Contempory Problems of International La Essays in Honour of Georg Schwarzenberger*, (London, 1988), pp. 157-176.

9. Philippe Sands, *Principles of International Environmental Law: Framewor Standards and Implementation* (Manchester and New York, 1990), p. 276.

## II. ETHICAL DIMENSION OF THE UNFCC PROCESS FOR DEVELOPING COUNTRIES

The normative consensus built through negotiating the UNFCC brought forth a convention with very strong ethical imperatives. The temporal dimension reflected in resolution 43/53 of the General Assembly, is of fundamental importance to achieve sustainable development, which is the main mandate of Agenda 21.

The concept of 'common concern' owes its evolution to the much controversial and debated notion of common heritage of mankind.[10] Common concern being bereft of proprietary connotations present in 'common heritage', can be said to be more flexible and suited to address global environmental issues like climate change. Besides involving the notion of obligations *erga omnes*, its constitutive elements include: freedom of access and equitable sharing (doctrine of *res communis*), protection for common good and beneficiaries of future generations (doctrine of public trust).[11] It can, therefore, be adduced that the long term temporal dimension of concern would necessarily involve burden sharing between the polluters and the victims. A juridical perspective will involve a preventive (precautionary principle)[12] and corrective approach for mitigating the effects of climate change. The former relates to inter-generational rights and the latter to intra-generational ones. The current literature on the inter-generational and intra-generational equity essentially presents a right *versus* duties situation wherein futuristic models are built for holding in 'trust' the open space of atmosphere.[13] A planetary obligation is said to be owed to future generations, as planetary rights are enjoyed by present generations. Though legally speaking, rights and duties do exist as a part of jurisprudential thought in all legal systems, on the international plane, rights of states tend to be obfuscated owing to 'auto interpretation' of the law by developed states.[14]

The central ethical issue is the role that equity should play in

10. R.P. Anand, "Common Heritage of Mankind : Mutilation of an Ideal" *IJIL*, vol . 37 (1997), pp. 1-8.
11. See generally, the Report of the Meeting of UNEP Legal Experts to examine the Implications of the 'common concern of mankind' concept on Global Environment Issues, Malta, 15 December 1990.
12. David Freestone, "The Precautionary Principle", in R. Churchill and Freestone (eds), *International Law and Global Climate Change* (London, 1991), pp. 21-29.
13. For a details study on intergenerational equity see generally, E.B. Weiss, *In Fairness to Future Generations, International Law, Common Patrimony and Intergenerational Equity* (1989).
14. R.P. Anand, *The New States and International Law* (New Delhi, 1978).

apportioning fairness between generations and fairness amongst states Fairness as a principle of justice cannot apply in a international lega order where 'scientific basis' alone cannot satisfy the test of fairness The demand of the AOSIS to abate dangerous climate change trends i not a pedagogic exercise, as their very existence is at stake. Unlik other international environmental problems, climate change represent a complex web of procedural and distributional issues. It affects th much needed use of energy resources, agricultural produce and carbon based fuels to sustain the carrying capacity of underdeveloped states The fairness of allocation costs and impact assessment of climate chang variations as propounded by one leading scholar Michael Grubb[15] raise three clear ethical strands: (*a*) aggregation of climate change nationa impacts for global welfare; (*b*) 'value of life' situation as propounde by western economists;[16] (*c*) evaluation of climate change impact concerning intergenerational equity.

With regard to aggregation of national impacts, countries being fre to mitigate climate change considerations by varied choices are pron to ignore the needs of a great majority of developing nations. A stric interpretation of aggregated needs calls for a Rawlsian approach[17] t distribute justice amongst the worst off rather than the develope industrialized nations.

Western economic models present a economic calculus based o 'value of life' for climate change impacts. A gross national produc (GNP-based) approach is argued to be cheaper as compared to a globa abatement regime. Developing countries see this as a move wherein th majority of the earth's population are being denied a quality of lif consistent with human dignity. It would be pertinent to recall what th Indian Minister for Environment in a letter to the heads of delegation attending the first Conference of Parties had stated. While rejecting th cost benefit analysis of western economists he stated "We unequivocall reject the theory that the monetary value of people's lives around th world is different because the value imputed should be proportional t the disparate income levels of the potential victims.....it is impossibl for us to accept that which is not ethically justifiable, technically accurat or politically conducive to the interests of poor people as well as th global common good."[18]

15. For an excellent analysis of climate change implications and developing countries se Michael Grubb, "Seeking fair weather : ethics and the international debate on climat change", *International Affairs* (London) vol. 7, (1995), pp. 463-495.
16. William D. Nordhaus, "Greenhouse economics : Count before you leap", *Th Economist*, July, 1990.
17. John Rawls, *A Theory of Justice* (London, 1971).

Henry Shue raises some fundamental questions relating to fair allocation of costs and the distributional aspects of the contents of justice[19] with respect to the poorest countries. He argues that a pure rational argument will fail to address issues of justice as the less industrialized states would have a 'potential' bargaining capacity and hence, will in all fairness receive equitable justice in the future but in contradistinction this would not be the case with poor states, as they are victims of the already existing unequal distribution of wealth and any attempt to place obligations on them would further exacerbate their condition.

It needs to be emphasized that the developing countries view the UNFCC objectives as a hard bargained compromise, based on principles of differential treatment having universal adherence.[20] Article 4(2), a separate article, lists exclusive commitments by Annex-I Parties. The Convention also places obligations on industrialized nations to combat climate change by returning either individually or jointly to 1990 levels of anthropogenic emissions of carbon dioxide and other greenhouse gases (GHG's). Article 4(7) furthermore states that "developing Country Parties will effectively implement their commitments which depend on the effective implementation of developed Country Parties of their commitments related to financial resources and transfer of technology..." Besides, fulfilling their commitments under the UNFCC, Annex-I Parties are asked to "take fully into account that economic and social development and poverty eradication are the first and overriding priorities of developing Country Parties". This provision is a testimony to the fact that poverty remains the single largest stumbling block to the achievement of genuine sustainable development.

The spirit of these operational commitments by way of common but differentiated responsibilities are reflected in the preambular paragraph 3 of the UNFCC which notes that "the largest share of historic and per capita global emission of GHG's having been in developed countries and as the per capita emissions in developing countries is very low, the share of global emissions originating in developing countries will grow to meet their social and development needs",

The UNFCC also calls upon developed Country Parties i.e. Annex-1 Parties to bear individual abatement costs. Besides, Annex-II Parties

18. Letter of Minister of Environment and Forests, Kamal Nath, dated 24 March 1995.

19. Henry Shue, "The Unavoidability of Justice" in Andrew Burrell and Benedict Kingsbury (eds) *The Politics of the Environment* (Oxford, 1989) pp. 373-397.

20. Statement of the Minister of Environment, Saifuddin Soz, at COP-3, Kyoto, 8 December 1997.

will provide new and additional financial resources and transfe environmentally sound and benign technologies, needed by developin country parties to meet the full incremental costs for implementation o their commitments. These commitments are limited to reporting o communication of information related to implementation. Thes differentiated set of commitments, it may be added, are an affirmatio of the deep pocket theory of fault based torts, casting a histori responsibility on developed States to undo past wrongs committed b way of unjust enrichment.

In accordance with the mandate of the UNFCC as provided i Article 4.2(d), the first Conference of Parties (COP-1) met in Berli from 28 March to 4 August 1995. The main issue before th Conference was to begin a process to enable appropriate actio beyond the period 2000 by adoption of a protocol or any othe instrument for strengthening the commitments of Annex-I Parties i Article 4.2(a) and also continue to advance the implementation o commitments under Article 4.1 of the UNFCC. An *Ad Hoc* Group o the Berlin Mandate (AGBM) was constituted to oversee this proces of evolving a legally binding protocol for adoption in December 199 at the third Conference of Parties (COP-3). The AGBM had clearly spelled out that the call to establish specific, legally binding targets and timetables for reducing developing country emissions of GHG's did not include new commitments by developing countries. However related controversial issues like joint implementation, flexibility differentiated targets and budget periods came to the fore. The US and other developed states argued for 'flexibility' which would allow a novel way of emissions trading (whereby a country that exceeds its emissions quota can buy another country's unused quota), joint implementation (whereby a country receives credits for emissions reductions it finances in another country) and budget period (which provided leeway as opposed to specific dates). Differentiation included the idea that developed country parties could adopt an overall target, and share it amongst themselves, without adopting a uniform target and also co-ordinating their policies and measures towards this end.

Developing countries argued that a central element of the proposed Protocol should include binding reduction targets with a specified time frame for carbon dioxide emissions and other GHG's not controlled under the Montreal Protocol. They also demanded fulfillment of UNFCC obligations by developed country parties to provide new additional financial resources and technologies for capacity building.[21] The Global Environmental Facility (GEF) according to Article 11 of the UNFCC

was entrusted with the operation of the financial mechanism. Restructured with a $2 billion replenishment, developing countries hoped that the GEF would address important issues of capacity building. However, on account of 'international objectives of the GEF', funds are often found to be insufficient for preparation of national inventories and national communications. Besides, they left novelties like 'joint implementation' failed to address larger developmental and infrastructural issues, which Annex-I Parties have to undertake, under the UNFCC.

It is against this backdrop that the IPCC released its Second Assessment Report (SAR), 1995 which confirmed "a discernible human influence on global climate, although certain scientific uncertainties did exist." The COP-2 which met in Geneva from 17 to 19 July 1996, further discussed the 70 odd proposals received by the AGBM secretariat for substantive negotiation. A Ministerial Declaration[22] was adopted highlighting the political importance of UNFCC objectives and their implementation. This Declaration endorsed the SAR "as currently the most comprehensive and authoritative assessment of the science of climate change, its impacts and response options now available". The Declaration also reaffirmed the 'principles of equity, common but differentiated responsibilities and precautionary measures' provided under the Convention and also called upon Annex-I Parties to accelerate negotiations on the text of a legally binding protocol fully encompassing the remit of the Berlin Mandate.[23] This would essentially involve commitments of Annex-I Parties regarding Quantified Emission Limitation Reduction Objectives (QELROS) with specified time frames such as 2005 , 2010 and 2020 with respect to GHG emissions not covered by the Montreal Protocol, and their policies and measures with respect to energy, transport, industry, agriculture, forestry and waste management sectors.

## III. BUILD UP TO COP-3, KYOTO (DECEMBER 1997)

The AGBM met in eight sessions from Berlin, 1995 to Kyoto, 1997, After painstaking work involving analysis of communications from a number of country parties, international organizations, non-governmental and intergovernmental organizations, a draft text of the

21. Montevideo Programme for the Development and Periodic Review of Environmental Law, Section A calls upon states to enhance capacities of developing nations.

22. The Declaration, however, did not address the needs of AOSIS and fossil fuel producing states.

23. *Ibid.*

protocol was submitted by Ambassador Estrada-Oyuela, Chairman the AGBM, with certain contentious issues to be left to the decided COP-3.[24]

The 35 industrialized nations and the developing countries we clearly divided in political alignments—European Union, JUSSCAN (Japan, US, Switzerland, Canada, Australia, Norway and New Zealan Central and East European economies in transition; and G-77 and Chin AOSIS and OPEC countries. Conflicting positions and proposals we put forth ignoring the Berlin Mandate. Japan, besides launching its Kyo initiative also tried to woo developing nations to agree to volunta commitments, with inducements of increased replenishment of t Global Environment Facility (GEF) and other enhanced OD programmes.

Japan proposed a 5 percent reduction in emissions from 1990 leve between 2008 and 2012 with a greater stress on voluntary and no uniform targets; the European Union in turn proposed a 15 perce reduction by 2010 with a clear emphasis on 'bubble targets', whic would entail shifting targets as long as European Union countries reac a collective emission target; the AOSIS States proposed flat rate 2 percent reduction by 2005; and the US, the largest polluter in terms per capita emissions, refused to be drawn into any negotiations f voluntary targets cuts. The US stand was for GHG 'stabilization' betwee 2008-2012, rather than agree for binding emission cuts. America interests belied the 'willingness-to-pay' syndrome and distributiv burden sharing, by insisting that apart from carbon dioxide, methan nitrous oxide, other 'new GHG's' such as hydroflurocarbon perflurocarbons and sulphur hexafluoride, be included in the GH inventory list.[25]

In this regard, it would be fruitful to took into a report of th Greenpeace International on the domestic pressure brought upon th US government by corporate houses, especialy auto manufacturers. The research brought to light the fact that the revenue of General Moto at $168.829 billion exceeded the GNP of Turkey, Denmark, Thailan Hong Kong and Norway. Whereas, Ford Motors with $137.5 billion annual revenues was more than the combined GDP of South Afric

24. Statement of the Chairman of the AGBM to the CPO-3, 1 December, 1997; also s Doc. FCCC/CP/1997/2/Add. 1.
25. The Byrd-Hagel resoluton adopted by the US Senate by 95-0 in September 199 clearly stated that the Senate would not ratify the Kyoto Protocol, unless bindi commitments include developing countries too.
26. F.J. Khergamvalla, "Corporate giants against deal at Kyoto", *The Hindu*, New Delh 30 November 1997, p. 12.

Finland, Poland and Saudi Arabia. Compared to the earnings of these corporate houses, the GDP of the whole AOSIS group stands at just over $149.1 billion.[27]

It is against this scenario of mistrust and double-speak that more than 150 country representatives met at Kyoto to adopt a protocol to bargain the allocation of QELROS objectives in carbon dioxide emissions by 2005 to 1990 levels. After nearly ten days of protracted negotiations and contentious bargaining a protocol was adopted, bringing to an end the Berlin Mandate.

## IV. FROM A STRONG 'FRAMEWORK' CONVENTION TO A FRACTURED BINDING PROTOCOL

The Protocol adotped pursuant to the mandate of Decision 1/CP— is largely a market oriented package for emissions trading. The main elements of the Protocol include: (i) QELROS obligations; (ii) flexible mechanisms — emissions trading regime, joint implementation and a clean development mechanism under the Protocol; and (iii) institutional set-up.

### A QELROS obligations

The Protocol in Article 3 provides for the main obligation wherein Annex-I Parties shall reduce their collective aggregate anthropogenic carbon dioxide equivalent emissions of carbon dioxide, methane and nitrous oxide as listed in Annex-A by 5 percent in the commitment period of 2008-2012. The Protocol specifically made the US to alter its earlier stand of 'stabilizing' to 'acceptance of emissions reductions' at 1990 levels by the year 2008-2012. However, the US bargained for a review of the three new gases of hydrofluorocarbons, perfluorocarbons and sulphur hexafluoride, by way of an Annex, to be adopted at COP-4 in November 1998. Article 3.8 of the Protocol also provides that any Annex-I Party may use the year 1995 as its base period for the three gases. Besides, the US demand to have a legal i.e. treaty-based right to emission trading is found in Articles 6 and 7 of the Protocol. Furthermore, Article 3.7 provides that during the first commitment period i.e. 2008-2012 the assigned amount for each Annex-I Party shall be equal to the percentage inscribed for it in Annex-B of its aggregate anthropogenic carbon dioxide equivalent emissions of the listed greenhouse gases in 1990, multiplied by five. This issue of determining individual QELROS commitments of the assigned amounts saw the European Community

27. *Ibid.*

with a limitation on emissions of 92% of the base year 1990 or an 8 reduction in the first commitment period 2008-2012; similarly the Unit States agreed to a 7% reduction, Australia 8%, while Japan and Cana an 8% reduction.]

Another contentious issue was that of 'sinks'. The develop countries position of sinks essentially involves a large number of polici and measures which human induced changes in forestry patterns facilitate sustainable development. Article 3.3 provides that "the n changes in green house gases from sources and removal by sin resulting from human induced land use changes and forestry activitie limited to afforestation, reforestation and deforestation since 199 measured as verifiable changes in stocks in each commitment perio shall be used by each commitment under Article 3 of the Protocol.

Furthermore, Article 3.4 provides that the Conference of Parti serving as the meeting of Parties of the Protocol "shall at its first sessi or as soon as possible thereafter, decide upon the modalities, rules an guidelines as to how and which additional human induced activiti related to the changes in the greenhouse gas emissions and removals the agricultural soil and land use change and forestry categories, sha be added to or subtracted from the assigned amount for Parties include in Annex-I ...." Besides, a Party may choose to apply such a decisio on these additional human induced activities for its first commitme period provided that the activities have taken place since 1990.

## B. Flexible Mechanisms

### *1. International emission trading regime*

This novel mechanism negotiated after a lot of debate is largely compromise solution, whereby Article 16 *bis* was inserted to placa non-Annex-I Parties. This provision vests all authority with th Conference of Parties to define the relevant principles, rules an guidelines for facilitating verification, reporting, and accountability fo emissions trading. It also provides that Parties included in Annex- may participate in emissions trading for the purposes of fulfilling th commitments under Article 3 of the Protocol. However, a contro mechanism is placed wherein such 'trading' can only be undertaken i a supplemental way. This ensures that Annex-B Parties fulfill their bas QELROS obligations under Article 3.1 of the Protocol. The Conferenc of Parties as the highest policy body o the UNFCC shall decide upo the modalities, rules and guidelines, at the first session after the Protoc comes into force. Under the proposed arrangement Annex-I parties ca

transfer their assigned amount to any other Annex-I Party as well as 'authorized legal entities'. However, the Annex-I Parties at any given commitment period can acquire any amount, but can not transfer the same. Besides this, emission trading shall only supplement the domestic action by parties under Article 3 of the Protocol.

### *2. Joint Implementation*

The concept of Joint Implementation (JI) is embodied in Article 6 of the Protocol. It very clearly states that for the purpose of fulfilling its commitment under Article 3 any Annex-I Party may "transfer to, or acquire from any such other Party emission trading units, resulting from projects aimed at reducing anthropogenic emissions by sources or enhancing anthropogenic removals by sinks of greenhouse gases in any sector of the economy". The condition laid for a valid JI are :(i) that such a project must have approval of all the Parties concerned; and (ii) the project should provide for a reduction in emissions by sources, or an enhancement of sinks that is additional to any that would otherwise occur. Furthermore, no Party acquires any emission reduction units if the reduction does not comply with provisions of Articles 5 and 6 of the Protocol. It may be worthwhile to look at these two articles which basically place an obligation on Annex-I Parties to keep ready their 'national system of estimation and an annual inventory' of anthropogenic emissions of sources and removals by sinks of greenhouse gases, not controlled by the Montreal Protocol, one year prior to their first commitment period. To further strengthen the commitments of Annex-I Parties, Article 4 provides for joint fulfillment of their commitments, provided the total combined aggregate carbon dioxide equivalent emission of GHG'S listed in Annex-A, does not exceed their amounts inscribed in Annex-B. Annex-I Parties are also allowed to undertake Activities Implementation Jointly (AIJ) within their regional economic integration organization.

Article 10 of the Protocol states that "Any Signatory Party to this Protocol not included in Annex-I may at any time, notify the depository that it has opted to be bound by this Article". The Party so choosing to be include in Annex-I will have to notify : firstly, its intention with the support of an inventory of GHG emissions not controlled by the Montreal Protocol and secondly the historical base year or period for implementation of emissions reduction commitments. This provision ensures that a larger number of non-Annex-I Parties are co-opted in Annex-I to enable wider burden sharing. However, developing countries have successfully resisted attempts made by some Annex-I Parties for a compulsory time frame for opting in clause.

### *3. Clean Development Mechanism*

The Brazilian proposal for a Clean Development Mechanism (CD finds place in Article 12 of the Protocol. It provides for a CDM wh would assist Parties not included in Annex-I in achieving sustaina development and thereby contribute to the objectives of the UNF besides supplementing efforts of Annex-I Parties in achiev compliance with their QELROS commitments under Article 3. The CD would thus serve a two-fold purpose: (a) it would benefit non-Anne Parties by way of various projects undertaken as certified emiss reductions as participants with Annex-I Parties; and (b) these certifica can be used by Annex-I Parties towards their compliance with QELR commitments as decided by the meeting of Parties to the Protocol. T CDM would operate under the guidance and authority of the Conferen of Parties, serving as the meeting of Parties to this Protocol which w decide issues relating to elaborate procedures of the operation of t CDM, participation of private entities, user fees for certified proje activities, auditing and verification mechanisms.

## C. Institutional Set-up

The Conference of Parties, the supreme body of the Conventi according to Article 13, shall serve as the meeting of the Protoc However, when the Conference of Parties serves as the meeting of t Parties to this Protocol, decisions under this Protocol shall be taken only those that are Parties to it. The chief functions of the Conferen of Parties are : (i) oversee the implementation of the Protocol by t Parties; (ii) examine the obligations of the Parties under the Protoc giving due consideration to the review clauses under Article paragraph 2(d) and Article 7 of the Convention; (iii) Facilitate t exchange of information on measures adopted by the Parties to addre climate change and its effects; (iv) seek mobilization of resources a the services and cooperation of competent international organizatior

According to Article 14, the Convention secretariat will serve as t Protocol secretariat. Besides, the SBI and the SBSTA of the Conventi will serve as the subsidiary bodies of the Protocol. Article 19 of t Protocol also provides for amendment procedures, whereas annexes integral part of the Protocol are provided in Article 20. As given und Articles 25 of the Protocol no reservations may be made to the Protoc

The Protocol is open for signature from 16 March 1998 to 15 Mar 1999, following which it will be open for accession. Pursuant to Artic 24, the Protocol will enter into force following ratification, acceptanc approval or accession of fifty-five parties to the Convention, whi

must incorporate Annex-I Parties which accounted in total for at least 55% of the total carbon dioxide emissions of Annex-I Parties in 1990.

## V. CONCLUSION

The most significant achievement of COP-3, Kyoto was the reaffirmation by the community of nations that global warming is perceived as a real threat to developing and developed states alike, although attitudes and approaches to abate the problem differ. The industrialized nations with the largest per capita emissions of GHG's, it is submitted, have failed to implement the full remit and substance of the Berlin Mandate by insisting that developing nations be made to undertake new commitments. These flexible mechanisms thrashed out at Kyoto are of supplementary nature and should not ignore the primary obligations of providing resources to developing States' capacity building needs. A workable comprise, largely through a flexible mechanism, for global action has been established. The future of this regime will largely depend on genuine demonstration of commitments by Annex-I Parties. The operational details i.e. structure and institutional aspects of the Clean Development Mechanism (CDM) will be an important issue to be negotiated at the Buenos Aires Conference. Though this cooperative mechanism appears to put out a carrot by way of partnership and voluntary commitments, the stick may involve non-commitment of obligations of Annex-I Parties, by way of unequal burden-sharing. The euphoria of emissions trading bargaining having subsided, it remains to be seen whether COP-4 to be held in Buenos Aires, Argentina this November 1998 would testify a successful, albeit partial fulfillment of promises made at Kyoto.

## POSTSCRIPT

The fourth Conference of Parties (COP-4) held at Buenos Aires, was a lukewarm effort by developed countries to support a time bound schedule of actions to curb GHG emissions along with increased aid to developed countries. The most contentious issue of 'voluntary commitments' found no place on the agenda of conference as developing countries refused to be drawn into any sort of bargaining which would dilute the Berlin Mandate. They steadfastly maintained that voluntary commitments by developing countries would go against the letter and spirit of all substantive provisions of common but differentiated responsibilities.

On the crucial issue of a 'clean development fund (CDM)' provided in Article 12 of the Protocol, delegates expressed divergent views. On

the procedural aspects of implementing the Fund, the G-77 preferre step by step approach, whereas the EU called for parallel efforts v emission trading. The Latin American countries favoured an 'inte phase approach' based upon drawing up of guidelines to a 'preparat process' preferred by the African States. Finally, the work program that was thrashed out bore a general and structured CDM comprising issues such as capacity building adaptation measures, transparency non-discrimination.

Apart from these important decisions, the COP-4 adopted perfunctory Buenos Aires Plan of Action, which calls upon States strengthen implementation mechanisms and encourage wi participation and acceptance of the Kyoto Protocol.

# A SHORT HISTORY OF THE 'CONSTITUTIONAL LAW OF PEACE' AND ITS POSSIBLE APPLICATION IN THE LIGHT OF ARTICLE IX OF THE JAPANESE CONSTITUTION

KLAUS SCHLICHTMANN*

## I. ARTICLE IX OF THE JAPANESE CONSTITUTION

The original Article as it appears in the 'MacArthur Notes' presumably written down by General Douglas MacArthur in January 1946, after a three-hour conference with Japanese Prime Minister Shidehara, reads:

> "War as a sovereign right of the nation is abolished. Japan renounces it as an instrumentality for settling its disputes and even for preserving its own security. It relies upon the higher ideals which are now stirring the world for its defense and protection."[1]

The final article as adopted by the Japanese parliament and promulgated on 3 November 1946 reads:

> "Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.
>
> In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be

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1 Quoted in Charles Kades, 'The American Role in Revising Japan's Imperial Constitution', *Political Science Quarterly*, vol. 104, no. 2 (1989), p. 224. It goes on: "No Japanese Army, Navy, or Air Force will ever be authorized and no rights of belligerency will ever be conferred upon any Japanese force".

recognized."[2]

Article 9 is the only stipulation that constitutionally abolishe
Is this provision relevant—considering that the abolition of wa
been a major foreign policy objective of the powers, at least duri
first half of this century? If the Western Powers have lost the init
could this be an option for a country like India, to take the initi
successfully turn the issue to its own advantage as a world powe
making a major contribution to the cause of a lasting world p
What is the historical and political purpose and direction o
'constitutional law of peace",[3] a subject not generally known, v
became a casualty of the Cold War...

## II. INTRODUCTION

There is not much literature on the subject of Article 9 of the Japa
Constitution (JC),[4] especially outside Japan. Almost nothing has
written from the point of view of the historian, with the aim of tra
the famous 'war-abolishing' clause to its historic origins. Clearly, Ar
9 did not suddenly appear out of nowhere. In fact, the provision
only be explained if there are legal precedents, because in Japa
legal tradition, based on Confucian social/administrative doctrin
precedent (j. *tehon*) is required.[5]

In the widest sense, the origin may be sought in the dialogue
encounter between East and West in the nineteenth and twen
centuries. Extra-European civilizations had a profound influence i
European Enlightenment and Renaissance. India, China and J

2. For constitutional provisions, see Albert P. Blaustein and Gisbert H. Flantz ( *Constitutions of the Countries of the World* (Oceana Publications, Inc, Dobbs N.Y.).
3. The expression drives for the French '*Le droit constitutional de la paix*' constitutional law of peace), See note 21.
4. See the following: Kobayashi Naoki, *Kempô daikyûjô* [Article 9 of the Jap Constitution] (Tokyo: Iwanami shoten, 1982); Charles Douglas Lummis, Se Noritomo, Tsuneoka and Shunsuke Tsurumi, *The Constitution of Japan*, (T Kashiwashobo, 1993 bilingual); Charlec M. Overby, *A Call for Peace Implications of Japan's War-Renouncing Constitution* (transl. by Kunihiro M with photogr. by Momoi Kazuma, Tokyo: Kodansha International, 1997 (bilin Tadakazu Fukase, Yasuo Sugihara, Yohiti Higuti and Kenji Urata (eds.), *In of World Peace for All Time—Proposals Based on the Constitution of Japan*, ( Shobo, May 1998 with extensive English-language abstract); Lawrence W. Beer, in Theory and Practice under Article 9 of Japan's Constitution", *Marquett Review*, vol. 81, no. 3 (Spring 1998), pp. 815-830.
5. See e.g. Keishiro Iriye, "The Principles of International Law in the Light of Con Doctrine", *Recueil des Cours* (1967-I), pp. 5-57.

having made the acquaintance first of the Portuguese and then the other Western powers, only Japan was successful in averting colonization by expelling the Christians in their alleged plot against them. With India and China subjugated, the Japanese 'revolt' against Western imposition and the emerging colonial order is in some respects seen as a 'proxy' of Asian resistance against that order.

This article aims at tracing the tradition of *constitutional* pacifism[6] to its roots, establishing the original ideas, legal and historical prerequisites for a just order and social organization, created to guarantee universal peace based, as it were, on standard norms and rules, i.e. to constitute a universal, democratic legal order. The history of the idea of peace in the Orient has not been written. However, the argument that Western legal and philosophical understanding and practice is (and always has been) more advanced and superior, and that the Oriental state, 'law' and social philosophy is incompatible with European standards can be rejected outright.

## A. The Asian Enlightenment

Similar to the development in Europe in many ways, but perhaps less violent and obvious, Asia had been changing, too. In Japan, Edo became the cultural and political centre at the end of the 18th century, and so-called 'Dutch studies' (*Rangaku*) thrived, preparing Japan for the modern, scientific age, first introducing modern medicine, astronomy, mechanical devices, as well as political and economic ideas, etc. The same thing was happening in India, where Calcutta became the centre of cultural exchange and modernization. Both cities already had a population of above one million around the year 1800. Asian countries were not unprepared. Unitil at least the 13th century the Orient had been equal in civilization; China (and probably India as well) even, "was ahead of the West in science and technology".[7]

Western commodities had not been much in demand in Asia until the nineteenth century, which was self-contained and gorgeous.[8] But now (before 1800) "Daimyô collected clocks and field glasses, drank

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6. I.e. the 'constitutional law of peace' or pacifist constitutionalism. This may be considered as part of the so-called 'organization' or scientific pacificm, which has a strong legal base.
7. Fernand Braudel, *A Hisotry of Civilizations* (translated by Richard Mayne, Penguin 1995, Paris, 1987), p. 168.
8. See for an account e.g. K.M. Panikkar, *Asia and Western Dominance* (London: George Allen & Unwin, 1959).

out of glass goblets and even watched experiments with electricity Issak Titsingh, the director (Opperhoofd) at the Dutch factory, a scho and merchant for the Dutch East India Company in Deshima at Nagasa took a great interest in Japanese civilization. Unlike anyone before hi he became a trusted friend of Japanese scholars and intellectuals w considered him as one of their own. He had close contacts wi numerous politicians, scholars, sinologists and sanskrists, like t President of the Asiatic Society of Bengal, Sir William Jones. "For short time he was the personification of a bridge between the Europe Enlightenment and the short-lived Japanese enlightenment."[10] Th period is called *bunka bunsei* in Japan.

The West benefited as much from this 'fusion' of Europe Enlightenment and Oriental Renaissance as the Asians themselve Napoleon Bonaparte showed great interest in Eastern civilization. A the world was preparing to become one in idea and knowledge, univers peace and world union for the first time became a possibility. A ne humanism based on universal values was brought into existence, whic in the European, classical tradition had been confined to Europ Humanist and universalist standards and ideals in the social, politic and philosophical disciplines were freed from their European conte and limitations, could be made universally applicable. In only tw generations this 'fusion' taking place between around 1770 and 183 brought a new vision of the world, an understanding, that transcende borders and united peoples of different colours and backgrounds wh for ages had been apart. As Raymond Cchwab has shown, "after 1771 the world [became] truly round".[11] Orient and Occident, complementin each other, produced a clear image of an 'integral humanism." In i 'real'-political implications this went very far, though it was soo opposed by new forces for nationalism, imperialism and soci Darwinism. But it remained a point-of-departure towards an achievabl common goal.

### B. Political Consequences of the Age of Enlightenment : the First Peace Societies and the First Hague Peace Conference

As a result, the first peace societies were founded in the U.S.A. an

9. John Whitney Hall, *Japan, From Prehistory to Modern Times* (Tokyo: Charles Tuttl 1971), p. 224 (original German, 1968).
10. Frank Lequin, 'Introduction', in : Frank Lequin (ed.), *The Private Correspondenc of Isaak Titsingh*, vol. I (1785-1811), (Amsterdam: J.C. Gieben, 1990, p. xxii.)
11. Raymond Schwab, *The Oriental Renaissance. Europe's Rediscovery of India and th East, 1680-1880* (New York: Columbia University Press, 1984), *La Renaissanc Orientale*, (Paris : Editions Payot, 1950), p. 16.

in England in 1815 and 1816, respectively.[12] The tender flower of the Age of Enlightenment continued to grow, and in spite of everything, in 1893 the 'World's Parliament of Religions' met in Chicago, and in 1899 the first truly international peace conference took place at The Hague. A new Concert of Nations was constituted, embracing Persia, China and Japan, besides the United States of America, Turkey and Thailand, and of course the European powers, including Russia, which had been invited to the conference. It was the first conference where independent, sovereign nation-states officially gathered in times of peace to seriously discuss the issues of disarmament and the peaceful settlement of disputes by arbitration. 'Go to court instead of going to war!' was the motto. So, at the conference in 1899 it was decided to establish an international court of justice, the Permanent Court of Arbitration.

Through the Russian Czar, Nicholas II., had officially been invited to the conference, its origin can be traced to a conference of the 'Interparliamentary Union' which took place in Budapest from 23-25 September 1896. Also, Jean (Ivan) de Bloch, a Polish banker, had written a book, *The War of the Future and its Technical, Economic and Political Relations*.[13] In the spring of 1898 de Bloch had been given an audience with the Czar, where he was able to illustrate his views. He explained the catastrophic effects and the 'impossibility of future wars', which he had described in his famous book. In November the Czar was recorded as having read portions from Leo Tolstoi's *War and Peace* to the Czarina.[14]

The main issue at both conferences—the Second Hague Peace Conference took place in 1907—were disarmament and replacing the 'institution of war' with a legal institution. However, when it came to the question of the compulsory jurisdiction of the court—obligatory arbitration, as it was then called, the Germans stalled, as they had in fact indicated earlier, brought the project down, and the conferences failed in their main objective. But public awareness had risen, and numerous peace societies were established, like the Interparliamentary Union (1889) already mentioned, and still in existence today.

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12. For obvious reasons, in the colonies the emphasis was on justice rather than on peace.
13. Published in Russian, French, German and English. See Peter van de Dungen, *The Making of Peace: Jean de Bloch and the First Hague Peace Conference* (Los Angeles Cal., 1983, Occasional Papers Series, No. 12 of the Centre for the Study of Armament and Disarmament).
14. Jost Dülffer *Regeln gegen den Krieg? Die Haager Friedenskonferenzen von 1899 and 1907 in der international Politik* [Rules against War? The Hague Peace Conferences of 1899 and 1907 in International Politics (Berlin, Frankfurt, M. und Wien: Ullstein 1981), no. 31, p. 362.

## C. The Interparliamentary Union, the 'Organization of Peace' and the Abolition of War

The original aim of the Interparliamentary Union (IPU), founded b Sir Randell Cremer, an Englishman (1838-1908) and Frederic Passy, Frenchman (1822-1912), was the "creation of a world parliament, global federation", which parliamentarians from Italy, Austria, German Switzerland, Belgium, Denmark, Great Britain, France, the U.S.A Sweden, the Netherlands, Spain, Portugal and also countries from Centra and South America, who had announced their cooperation in the projec had subscribed to.[15] In 1904 during the Russo-Japanese war, Alber Gobat, the General Secretary of the IPU, had spoken in the White Hous where the participants of the conference held in St. Louis had bee received by U.S. President Franklin D. Roosevelt: "We look at thi institution [The Hague Conference] as the starting point of the mos important evolution ever entered upon by mankind."[16] And in 1905 th Inter-Parliamentry Committee on the Establishment of an Internationa Parliament "recommended that" the Hague Conference should becom the world tribunal and ... the Inter-Parliamentary Union should itself b converted into a universal legislature."[17]

After the war the Interparliamentary Union renewed its activities with conferences held in Stockholm (1921), Vienna (1922), an Copenhagen (1923). In August 1924, at the XXII Conference of th Interparliamentary Union held in Bern, a Resolution adopted by th parliamentarians recommended the constitutional banishment of war The Resolution called for

> "proposals [to] be submitted by the National Groups to their respective parliaments for *amendments to the Constitution*...a)

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15. Ralph Uhlig, *Die Interparlamentarische Union 1889-1914 - Friedenssicherungs bemuhungen im Zeitalter des Imperialismus* [The Interparliamentary Union 1889-191 — Attempts at securing peace in the age of imperialism] (Stuttgart, Franz Steiner 1988), pp. 65-66.
16. *Ibid.*, p. 335. The conference led to an American initiative for the Second Hague Peac Conference.
17. Francis Harry Hinsley: *Power and the Pursuit of Peace. Theory and Practice in th History of Relations Between States* (Cambridge, Mass., Cambridge University Press 1963), p. 143. Japan began to actively participate in the work of the Union fron about 1906. In 1910 it officially joined the organization, and from 1911 onwards i regularly attended sessions and paid its annual dues. The First World War put a sto to the activities of the IPU, and Japan joined the war on the side of the *Entent Cordial*. Naturally India, under the British Raj, did not participate in IPU, but late became a member of the League of Nations, with certain rights of autonomy.

to forbid resort to war."[18]

This was new. It was clear, however, that if the institution of war was to be abandoned, an international court with binding powers was a necessary precondition. Consequently, the Resolution asked "(b) to make arbitration or other amicable or judicial means obligatory..."[19] In the following years international jurists and progressive politicians attempted to adapt their constitutions and 'harmonize' international and constitutional law. As the German parliamentarian professor Schucking pointed out at the Interparliamentarions conference," *wars could then only be declared, if the constitution is revised at the same time*."[20] There were other events where the quest was confirmed: in 1929 in Athens, Greece, at the XXVII Conference of the International Peace Bureau (IPB, Bern), following the conclusion of the Paris Peace Pact (Kellogg-Briand), an IPB Resolution called on the signatories to "amend their constitutions" to make recourse to the pacific settlement of disputes obligatory.[21] The 'harmonization' of constitutional law with the law of nations (international law) was perhaps the most significant legal development in the interwar period. We will deal with it in greater detail in Section F.

### D. 'Shidehara Diplomacy' and the Abolition of War

In most advanced countries in the interwar period the abolition of war become a major foreign policy objective. In Japan this policy is most prominently linked to Shidehara Kijuro (1872-1951) who became Foreign Minister in June 1924.[22] Prior to that, from 1918 until his appointment as foreign minister, his name had been on the list of judges

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18. English text in : Union Interparlementaire, *Compte rendu de la XXII Conférence tenue a Berne et Genève du 22 au 28 Aoüt 1924*, (Lausanne, Genève, etc., Librairie Payot 1925), p. 666.
19. *Ibid.*
20. *Ibid.*, p. 422 (emphasis added).
21. Quoted in Boris Mirkine-Guétzevitch, 'Le droit constitutionnel et l'organisation de la paix (droit constitutionnel de la paix)' [Constitutional law and the Organization of peace (The constitutional law of peace)], *Recueil des Cours* (1933-III), p. 741.
22. It is necessary for our argument to show Japan's involvement in the movement to abolish war in the interwar period. See Klaus Schlichtmann, 'The Ethics of Peace: Shidehara Kijûrô and Article 9 of the Constitution', *Japan Forum*, vol. 7, no. 1 (April/spring 1995), pp. 43-67; and, by the same author, 'A Statesman for The Twenty-First Century? The Life and Diplomacy of Shidehara Kijûrô (1872-1951), pp. 43-67; *Transactions of the Asiatic Society of Japan*, fourth series, vol. 10 (1995), pp. 33-67.

for the Permanent Court of Arbitration at The Hague.[23] It will be us to give a brief account of Shidehara's career prior to becoming for minister, in order to show that 'Article 9 did not suddenly appear ou nowhere', and is also historically Japanese.

After passing the diplomatic service examination in 189 Shidehara's first assignment as a diplomat was to the Japanese consu at Inchon, Korea, under Ishii Kikujirô (1866-1945) as consul, a se liberal diplomat. Korea at that time was a place where one could power politics in a nutshell. After more than two years of diplom training, Shidehara, now twenty-seven years old, was transferred London, where he reached just after the conclusion of the First Ha Peace Conference, which continued to be much talked about. Like great majority of diplomats and politicians, Shidehara, too, was mu impressed with the peace conference's basic ideas of peace a disarmament, and a universal legal order and brotherhood. He sa great potential in these ideas for the peaceful development and progr of the world—and of Japan.

Having been consul at Antwerp, Belgium, from December 1900 September 1901, Shidehara was returned to Pusan, Korea. In 1904 became acting chief in the Telegraphic and Information Bureau in Foreign Ministry, and then the bureau's intelligence chief. In this w he became one of the best informed persons in international affairs ali at the time. His English was flawless.

In 1912 Shidehara negotiated on behalf of Japan to deal with Californian immigration laws, which discriminated the Japanese. mediation was nearly successful, but in the end the state of Califor had its way, in spite of Washington's endeavours to placate the Japane In December 1913 he left Washington for London, and shortly thereaf took the post of minister plenipotentiary to the Netherlands and Denma taking up residence at The Hague, where he witnessed the beginning

23. Documented in the Archives of the Japanese Foreign Ministry (*Gaikô shiryôkan*) Tokyo (Documents on the Hague Peace Conferences).

24. For excellent accounts of 'Shidehara diplomacy' (*Shidehara gaikô*) in English Bamba Nobuya, *Japanese Diplomacy in a Dilemma. New Light on Japan's Ch Policy, 1924-1929* (Kyoto; Minerva Press 1972) and Takemoto Toru, *Failure Liberalism in Japan : Shidehara Kijuro's Encounter with Anti-Liberals* (Washingt University Press of America, 1978). Perhaps not so easily accessible is the Japan biography on Shidehara, published by the Shidehara Peace Foundation, Shideh Heiwa Zaidan, *Shidehara Kijûrô*, Tokyo: Dai satsu 1955. In German there is own biography of Shidehara, Klaus Schlichtmann, Shidehara *Kijûrô (1872-195 Statsmann und Pazifist — eine politische Biographie* [Shidehara Kijûrô, statesm and pacifist — a political biography] (Hamburg: Veroffentlichungen der Deuts Japanischen Juristenvereiningung, 1998).

World War I. From 7-10 April 1915 an international peace conference at The Hague, organized by the '*Nederlandsche Anti-Oorlog Raad*' (Netherlands Anti-War Council), was attended by politicians and academics from the United States, Austria, Belgium, Germany, Great Britain, Hungary, Norway, Sweden and Switzerland, an event that surely attracted Shidehara's attention.

The '*Nederlandsche Anti-Oorlog Raad*' was founded by a Dutch organization called '*Vrede door Recht*' (Peace Through Law, established in 1906). At least one demand in the five-points 'Minimum Program' which was adopted by the conference concerned Japanese interests. Item No. 2. of the 'Minimum Program' stated:

> "The States shall agree to introduce in their colonies, protectorates and spheres of influence, liberty of commerce, or at least equal treatment of all nations."[25]

Shidehara as an observer must have realized the significance of the program for Japan and Japanese trade in the colonies, whence it had been excluded so far.

Shidehara returned to Tokyo in September the following year, and took the post of vice-foreign minister in the cabinet of Katô Takaaki (1860-1926). Soon after, he also assumed chairmanship of the preparatory committee for the post-World War I peace settlement (*Nichi-Doku seneki kowa junbi iinkai)*, which was to be negotiated at Versailles after the war. Several governments made plans for the future world organization. The Japanese position was peculiar, as will be shown later.

In spring 1919 Shidehara became ambassador for Japan in Washington, where he came in contact with the American 'Outlawry Movement', aiming at outlawing war. Prominent politicians and industrialists supported the movement. As chief negotiator at the Washington Naval Disarmament Conference (12 November 1921-6 February 1922), a conference that actually resulted in the reduction of armaments, and maintaining a 'ceiling' for a decade, Shidehara was instrumental in returning Shantung province to China, which Japan had acquired as one of the victors in World War I. Later, as foreign minister, he returned the Boxer indemnity money Japan received, to be used for cultural projects and cooperation between China and Japan.

Shidehara was appointed Foreign Minister in the cabinet of Kato Takaaki in the June 1924 general elections. On the day of assuming

25 De Jong van Beek en Donk, *History of the Peace Movement in the Netherlands* (The Hague, 1915), p. 45. In 1915 also, the Third Hague Peace Conference was to have taken place originally.

office he evoked the spirit of the Paris Peace Conference and Washington treaties. He stated that there are "infinite similarities in nature of mankind despite their differences in race, religion language", and the conflicts had their roots in people dramatizing s superficial discrepancies. He prepared for the Paris Peace tr (Kellogg-Briand Pact), as well as the London Naval Conference in 1 One of his famous sayings was: "The global humanity together create the world without war!" *(Sekai jinrui to tomoni sensô naki s no sôzô!)*.[26] In a lecture at Keiô University in October 1928, Shide pointed out that in diplomacy, too, "the means could never justify end" (*mokuteki wa shudan o gôrika suru*), and attacked the militar Just as in personal relations among people, Shidehara maintained "in the international relations, too... the law of cause and eff according to one's deed (*inga ôhô*), is applicable, " in accordance the Buddhist teachings.[27]

In spite of his successful foreign policy, Shidehara diplomacy support, due to intrigues launched by the Privy Council and conspiracy of the military. In the end, even "Shidehara's name st high on the death list." Somehow he survived, and went into an 'in emigration'. During the war, he participated in a group to stop the G East-Asia War. It was Shidehara who suggested Article 9 to Gen Douglas MacArthur after the war when he was prime minister.

## E. The League of Nations and Japan

Although Japan had had no plans of its own for the new wo organization that was to be established after the First Great World W it made substantial contributions to its cause and maintenance. Hav been on the side of the victorious Allies, Japan was a founding Council member of the League of Nations, whose Covenant was par the Versailles peace settlement. Historically and legally, the League Nations was the successor of the 'Hague Confederation of States'. In too, was listed as member.

On the day of the armistice, a six-page report by the 'Political Aff Bureau' in the foreign ministry named 'thee conditions' for a success post-war international organization: (1) the organization is suppor by the political leadership of the world; (2) the readiness of the sta

26. Shidehara Heiwa Zaidan (Ed.), *Shidehara Kijûrô* (Tokyo: Dai Satsu, 1955), p. This is the Shidehara biography (in Japanese), published by the 'Shidehara P Foundation' (Shidehara Heiwa Zaidan). There was a 'Shidehara Peace Library the *National Diet Library* in Tokyo until around 1992.

27. *Shidehara Kijûrô* (Tokyo: Dai Satsu, 1955), p. 273. *Inga ôhô* is a Buddhist t

"to accept restrictions on their behaviour", and (3) "a viable system of sanctions". Furthermore, the report enumerated five "issues of concern for Japan", i.e. : (*a*) limitations on armament/disarmament, (*b*) better "economic opportunity", e.g. through "opening of the closed door economic systems created by the colonial powers", (*c*) compatibility of League of Nations principles and Japan's bilateral agreements like the alliance with Britain, (d) limitation of national sovereignty, and (e) the question of Germany's membership. (It seems Japan wanted Germany to join immediately in the League). The report prohesied that the League would have difficulties fulfilling its high aimes, if these conditions were not met.[28] After the commencement of the conference, it was Shidehara again who as vice-foreign minister and chairman of the preparatory committee for the post-World War I peace settlement coordinated the work of the Japanese delegation at Versailles, and sent instructions from Tokyo to the delegation.[29]

Even more prominent, at least to the Europeans and in Geneva at the League of Nations, was Nitobe Inazo (1862-1933), who was the League's Under-Secretary General for many years. Nitobe also co-founded the International Committee for Intellectual Cooperation (ICIC) in Geneva, a predecessor of today's UNESCO.[30] Japan mediated in several disputes on European issues, and found peaceful solutions to the various problems.[31] Until well into the thirties it cooperated with the League. Indians, too, it seems, participated in ICIC and IICI (International Institute of Intellectual Cooperation, Paris) conferences and meetings. After the failure of the 'Geneva Protocol' (1924),[32] which world have made arbitration obligatory and given the League "teeth",

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28. Thomas Burkman, *Japan, the League of Nations, and the New World Order, 1918-1920* (the University of Michigan, Ph.D. diss. 1975), p. 102.
29. The most spectacular Japanese contribution at the Versailles Peace Conference was the proposal for the inclusion of a clause on racial equality in the League of Nations Covenant, which demanded "equal and just treatment in every respect, making no distinction, either in law or in fact, on account of their race or nationality", to all 'alien' nationals in the League member states. "Throughout the Peace Conference, the racial equality proposal was the most highly debated issue," Shimazu Naoko, 'The Japanese Attempt to Secure Racial Equality in 1919', *Japan Forum*, vol. 1, no. 1 (April 1989), p. 97. This was strongly supported by India and China.
30. See John F. Howesh (Ed.), *Nitobe Inazo — Japan's Bridge Across the Pacific*, (Boulder, San Francisco and Oxford: Westview Press, 1995).
31. See Matsushita Masatoshi, *Japan in the League of Nations* (New York : Ams Press, Columbia University Studies in the Social Sciences, 1968, orig. 1929).
32. The Geneva Protocol was unanimously adopted by all forty-seven member-states at the 5th League Assembly on 2 October 1924, but failed to be ratified the following year.

constitutional pacifism continued to be pursued as an option by individu countries.

### F. The Harmonization of National and International Law

Historically, the first constitutional prohibition of going to war w written into the Constitution of the First French Republic (1791), whic stipulated:

> "The French Nation forever renounces resort to any war with the aim of conquest and will never employ its forces against the liberty of any people."[33]

More elaborate and precise, the Norwegian Constitution of 1814, i its revised form of 1905, still in force, states:

> "In order to secure international peace and security, or in order to promote international law and order and cooperation between nations, the Storting may, by a three-fourth majority, consent that an international organization, of which Norway is or becomes a member, shall have the right, within a functionally limited field, to exercise powers which in accordance with this Constitution are normally vested in the Norwegian authorities, exclusive of the power to alter this Constitution."[34]

These early constitutions reflected and anticipated an internationa environment that had assumed global dimensions.[35] In the period afte the First and Second World War this trend was advanced considerably,[3

33. For the French see Boris Mirkine-Guetzevitch, 'La Renonciation à la Guerre dan le Droit Constitutional moderne', *Revue Hellenique de Droit International*, vol 4, no 3-4 (July-December 1951), p. 8.
34. See Blaustein/Flantz (Eds.), *Constitutions of the Countries of the World.*
35. See for the most elaborate account Boris Mirkine Guetzevitch, note 21, pp. 676-773 Vespasian Pella, *La protection de la paix par le droit interne, Adaptions de Constitutions et des législations pénals au stade actual du développement de la vi internationale,* Mémorandum élaboré à la demandé du Comite pour le désarmemen moral de la Conférence pour la réduction et la limitation des armements (Paris, 1933) In English there is little if any literature on the subject, but there is in German an other European languages. However, see on the Internet, www.eur.nl/frg/iacl, th website of the *International Association of Constitutional Law*, founded in 1981 confessing similar goals.
36. Explicitly accepting international law as 'part of the law of the land' were th constitutions of Austria and Estonia (both 1920), Spain (9 December 1931), th Philippines (1935) and Ireland (1937). Hermann v. Mangoldt, 'Das Voelkerrecht i den neuen Staatsverfassungen' [International law in the newly devised constitutions'] *Jarhabuch f. International Recht,* vol. 3 (1950/51), p. 12.

and a number of constitutions were revised and newly adopted. Especially after 1945 there were several that provided for limiting state sovereignty and delegating sovereign powers to an international organization with the aim of creating a supranational authority, to guarantee international peace and security.

Most of the literature on this subject is in French, keeping with the diplomatic tradition.[37] The title of a book published in French in 1933 was, in English translation, *Constitutional Law and the Organization of Peace*, by Rumanian jurist Boris Mirkine-Guetzevitch. Constitutional amendment along these lines was seen as a precondition for establishing an effective organization for the maintenance of international peace and cooperation. It was believed that the international law of peace could not and should not merely be imposed from above. Democratic countries, therefore, should reflect international law domestically in their constitutions — as India did in its 1949 Constitution (Article 51) and Japan in 1946 — and thus create the conditions for founding an effective international organization of peace, based on the rule of law. Because an international order could not be imposed from above, provisions for transferring sovereign powers to an international organization could be employed by a country to create a supra-national authority, an effective organization of peace, that might also, in effect, enforce international law on individuals. Any country could does this independently, of its own free will.

The constitutions which provide for passage of a law, in which sovereign powers — 'security-sovereignty' — are delegated to an organization like the U.N. are decisive. France was the first nation to state in its post-war constitution that

> "On condition of reciprocity, France consents to the limitations of national sovereignty necessary for the organization and defense of peace."[38]

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37. It may be assumed that in Anglo-American tradition—Britain has not even a constitution—the international rule of law is 'implied' and part of the political philosophy.

38. In an article in the *New York Herald Tribune*, on 20 February 1946, under the headline "France Ready to Accept Curb on Sovereignty — Proposal for Constitution, First in Any Nation, Is Approved by Committee", it was stated that "France became today the first nation to take up the question of world peace on a constitutional basis when the Committee of the National Assembly preparing the new Constitution approved an article by Socialist members... The article has been hailed... as the first step toward the day when all nations will set down in their constitutions clauses and specifications which will form the basis of their participation in a world organization ... the very prospect of a nation committing itself constitutionally to giving up some of its rights

The condition of reciprocity — a basic and binding concep international law - is also found in the Argentine, the Danish, the Gr the Guatemalan, the Irish and Italian constitutions. The idea is to a a method, by which — in the Kantian sense — a process of formi "federation of free states" or "federative association" could be initia with "other states [who] might adhere thereto." Such "alliance [th might gradually be extended.".[39]

We have already in the beginning quoted the original Japan Article, presumably suggested by Shidehara Kijûrô to General Doug MacArthur on 24 January 1946, with the aim of abolishing war. article is significant in relation to the other constitutional stipulati that provide for delegating sovereign powers to an institution like U.N. and the Security Council. It may not be far-fetched to assume t this Constitutional Pacifism fits into similar law making efforts that fo expression (for example) in the historical U.S.-Resolution of 1949 wh stated that

"it is the sense of the Congress that it should be a fundamen objective of the foreign policy of the United States to support a strengthen the United Nations and to seek its development into a wo federation open to all nations with defined and limited powers adequa to preserve peace and prevent aggression through the enactme interpretation, and enforcement of world law."[40]

The call for a 'world federation' in the 1942 'Quit India Resolutic of the Indian National Congress also fits into this framework, havi the aim explicitly to

> "ensure the freedom of its constituent nations, the prevention of aggression and exploitation by one nation over another, the protection of national minorities, the advancement of all backward areas and peoples, and the pooling of the world's resources for the common good of all."[41]

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for the benefit of all nations is exciting..." I thank Professor Joseph Baratta, of Centre for Global Community and World Law in Cambridge, Massachusetts, having brought this article to my attention. The question if this provision in Preamble of the Constitution of the Fifth Republic is still valid after a new Constitut had been promulgated in 1958, is settled. Commentators agree that this is so.

39. Immanuel Kant, *Perpetual Peace: A Philosophical Sketch*, Second Definitive Arti for a Perpetual Peace, '*The Law of Nations Shall be Founded on a Federation Free States*' (Konigsberg, 1795).
40. This was not adopted, but shows what is or was possible, had the internatio situation allowed it to be considered a realistic option.
41. Quoted in *Link*, vol. 34, no. 5 (9 August 1992), 'Relevance of the Quit In Movement', p. 11.

## G. The United Nations and Japan

Japan joined the United Nations in 1956, when India was already engaged in U.N. activities. In the speech before the General Assembly, foreign minister Shigemitsu quoted from the Preamble of the Japanese Constitution:

> "We, the Japanese people, desire peace for all time and are deeply conscious of the high ideals controlling human relationship, and we have determined to preserve our security and existence, trusting in the justice and faith of the peace-loving peoples of the world. We desire to occupy an honored place in an international society striving for the preservation of peace, and the banishment of tyranny and slavery, oppression and intolerance for all time from the earth. We recognize that all peoples of the world have the right to live in peace, free from fear and want."[42]

According to Article 24 of the U.N. Charter — and relevant to the 'Constitutional Law of Peace' — the 'peace-loving peoples of the world', or rather their governments, are supposed to "confer on the Security Council primary responsibility for the maintenance of international peace and security". In reality, however, primary responsibility still lies with the individual nation state (or a military alliance). International peace and security are non-existent. If one consults the old masters who have defined the powers of state in relation to international and treaty law like Georg Jellinek,[43] one must come to the conclusion that the 'consent model' is not sufficient. It does not justify such a far-reaching limitation of national sovereignty as Article 24 of the U.N. Charter implies—which is necessary, however, for putting the U.N. security system into effect. The discussion, under what conditions and how the system of collective security can be put into effect, has not started. However, it is unlikely that world peace can be maintained if it is not.

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42. Preamble. Watanabe Yukio, *Shigemitsu Mamoru, Shanhai jihen kara kokuren kamei made* [Shigemitsu Mamoru: from the Shanghai incident until joining the U.N.] (Tôkyô, Chûô kôron sha 1996) (Chûkô shinsho 1318), p. 237. The term 'freedom from fear', also found in the *Atlantic Charter* of 1942 is said to be derived from the Buddhist *abhaya-dana*.

43. Georg Jellink, *Die rechtliche Natur der Staatenvertrage, ein Beitrag zur juristichenn Construction des Volkerrechts* [The legal nature of treaties of states, a contribution to the juristic construction of international law) (Wien: Holder, 1880); see also Lassa Francis Lawrence Oppenheim, *International Law, A Treatise*, ed. by H. Lauterpacht, (London and New York: Longmans, Green, 1955/1967, 8th ed), p. 17, para 12.

What matters here, both in relation to Article 24 of the U.N. Chart and the 'Constitutional Law of Peace', is the condition of reciproci already referred to. In the Charter we find this principle as the 'princip of sovereign equality', and of justice and equal rights of all membe states. "All members shall settle their international disputes by peacef means in such manner that international peace and security, and justice are not endangered." (Arts. 2, 3). Resort to "the threat or use of force is prohibited by the Charter, yet all states with few exceptions maintai their right to go to war, if they consider it proper and in their interest, i the name of self-defence. Even Japan maintains an army, an institutio sanctioned by the U.S. Security Pact (and perhaps Article 51 of th U.N. Charter), but not reflected in the Japanese Constitution. Th Japanese Constitution does not provide for declaring war or determining a state of defense, as do ordinary, regular constitutions. However, in today's highly armed and defensive international environment, the principle of sovereign equality in the U.N. Charter allows and even compels nation-states, including Japan, to make individual arrangements for self-defence. The only significant element and 'way-out' is the binding force of the principle of sovereign equality and reciprocity in the case of a carried motion to abolish war.

The constitutional clauses providing not only for limiting sovereign powers with regard to going to war — something Japan has already done- but delegating those powers to an international organization, constituting its executive powers and authority, are clearly related to Article 24 of the U.N. Charter. Looking at Article 9 of the Japanese Constitution as a constitutional motion, a public declaration to abolish war, it appears that this motion needs to be seconded. This is a task for politicians. Required is a vision, a legal base and people/politicians to enact a scenario where this becomes a reality. Real U.N. reform requires nations to pool their sovereignties for the common good, common security and greater cooperation and coordination — at least if peace is to become a positive state and not remain "a negative concept."[44] The peace-loving peoples of the world, together with conscientious U.N. members can make it possible.

Legally, the principle of sovereign equality in the U.N. Charter, sometimes blamed for inadequancies in the U.N., would begin to obtain new meaning and *direction*, i.e. (1) a 'pull' or moral obligation would be created for other nations to consider following suit; (2) it will open the debate on the issue of the abolition of war: and (3) there will be a

44. Latha Varadarajan, 'From Tokyo to The Hague: A Reassessment of Radhabinodh Pal's Dissenting Opinion at the Tokyo Trials on Its Golden Jubilee', *Indian Journal of International Law*, vol. 38, no. 2 (April-June 1998), p. 236.

legal obligation, as obviously the (constitutional) condition of reciprocity will come into play; and (4), the Security Council and the United Nations as a whole will begin to develop a legal authority and sovereignty of its own, and become "the sole executive arm of the new world order."[45]

The result would be that general and complete international disarmament will for the first time become a realistic scheme. The following Sample Bill illustrates the inherent possibilities of such measure if it were adopted.

**SAMPLE BILL**

that may be enacted by any country, to get rid of the burden of armaments, for cooperation and to establish a supranational authority, a peace study and education project)

- **The Parliament**
  - Conscious of its responsibility, to its electorate and as a member of the United Nations,
  - In order to promote international peace and security, maintain just and honorable relations between nations, foster respect for international law and treaty obligations in the dealings of organized people with one another, and encourage settlement of international disputes by arbitration.[46]
  - Aiming at a permanent world peace and general and complete disarmament,
  - Animated by the resolve to initiate a process, in the course of which the United Nations, endowed with limited sovereign powers of its own, may evolve into an efficacious instrument for securing and safeguarding peace, sustainable growth and our natural environment,
  - Recognizing the fact that concrete, confidence-building measures and legal steps are required in order to ensure prompt and effective action by the United Nations,
  - For the organization and defence of peace,[47]
  - Aspiring sincerely to an international peace based on justice and order,[48]
  - For an organization which will ensure peace and justice among nations.[49]

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45. Mohammed Bedjaoui, *The New World Order and the Security Council, Testing the Legality of Its Acts* (Dordrecht, Boston and London: Martinus Nijhoff, 1994), p. 7. So, that the International Court of Justice could finally become what its 'well-wishers' and those who conceived its idea "had laboured long and hard" to achieve, i.e. a "body ....[with] judges who have the power to determine legal issues by rendering a binding decision in accordance with law". M. Shahabuddeen 'The International Court of Justice : The Integrity of an Idea', in R.S. Pathak and R.P. Dhokalia (Eds.), *International Law in Transitiion. Essays in Memory of Judge Nagendra Singh* (New Delhi : Lancers Books, in collaboration with Martinus Nijhoff, 1992), pp. 361 and 342, respectively.
46. Adapted from the Indian Constitution of 1950, Article 51.
47. Adopted from the Preamble of the French Constitution of 1946, §15.
48. Adopted from Article 9 of the Japanese Constitution of 1947.
49. Adopted from the Italian Constitution of 1948, Article 11.

- To bring about and secure a peaceful and lasting order in Europe and among the nations of the world,[50]
- To promote international legal order and cooperation,[51]
- For the establishment and development of all forms of international cooperation conducive to the consolidation of peace, for the development of relations contributing to the overcoming of the bloc divisiveness of the world, and to the attainment of general and complete disarmament,[52]
- Pursuing the strengthening of peace, and of justice and the development of friendly relations between peoples and states, and in order to serve the national interest and promote cooperation with other states,[53]
- For the purpose of international cooperation in matters of common concern,[54] and
- To promote the development of the international rule of law,[55] as well as democratic order and human rights,[56]

**Furthermore**

- Affirming that, while aiming at securing economic and social progress, the main purpose of the United Nations is the maintenance of peace and security, and the prevention of aggression,
- Having no doubt that the United Nations Security Council is alone competent and legitimated to take effective measures in case of threats to the peace, breaches of the peace, and acts of aggression,
- Calling for an early convention, to devise and implement 'plans for the establishment of a system for the regulation of armaments, to guarantee the least diversion of armaments of the world's human and economic resources, and to bring about general and complete disarmament, and abolish all nuclear weapons,
- In order to serve the peace of the world,[57]
- Passes this law, transferring certain sovereign powers, concerning the right of belligerency of the state and national and international security and world peace, to the Security Council of the United Nations, and hereby, for its part, convinced that other countries will follow suit, confers primary responsibility for the maintenance of international peace and security, in all formality, in conformity with the principles of justice and international law, to the U.N.Security Council by invoking the principle of reciprocity in the act, by this lawful sovereign act, in accordance with

50. Adopted from the German Constitution of 1949, Article 24.
51. From Article 20 of the Danish Constitution of 1953; this is practically identical with the wording in Article 93 of the Norwegian Constitution.
52. Part VII of the Constitution of the former Socialist Federal Republic of Yugoslavia, of 21 February 1974.
53. From Article 2 II of the Greek Constitution of 1975.
54. Article 29, 4 of the Irish Constitution of 1937.
55. From Article 92 of the Dutch Constitution of 1983.
56. Article 75, 24 of the Argentine Constitution of 1994, enabling the country "to delegate competencies and jurisdiction to interstate organizations.".
57. German Constitution of 1949, Preamble.

> the U.N. Charter and the relevant provisions in constitutional law, for ceding certain sovereign powers, for the above stated purposes, including the promotion of the economic and social advancement of all peoples, it agrees to accept and carry out the decisions of the Security Council in accordance with the revised Charter, and to obtain its own vital national interest.
>
> And by passing this law, it stipulates that (1) International or World Law may also be enforced on individuals violating the Law, (2) the veto powers of the permanent members of the Security Council be limited to Chapter VII of the U.N. Charter, and (3) the legal authority of the Security Council as the executive branch of the United Nations be determined, and its powers defined, in accordance with the relevant provisions in the U.N. Charter, the rules and principles of international law and the rule of law. A Charter of Authority will be drafted for this purpose.

In this connection the question has arisen, whether the big powers would agree to such limitation or transfer of powers. The Swiss theologian Emil Brunner addressed the point in 1943, saying that individual nations could not "surrender their right of self-defense to a supranational organization and submit to the superior will of the family of nations", because "great powers" would not "submit to the will of a central power".[58]

However, the U.N. Charter took this fact into account, evidently by already making the great powers themselves the permanent and hard core of the central power, which the 'family of nations' was to establish by transferring sovereign powers or "primary responsibility" to it. This, however, can only be done effectively through a legislative act. At the same time such legislation could define and limit the powers of the Security Council. Not "the creation of a unified will" is the precondition for achieving the aim, but the "intention of peace"[59] in a single nation that would render itself defenseless and could be followed up by others, giving the U.N. the power to do its job.

We are not so much concerned here with the big powers. With all its faults and neo-imperialist attitudes, even the U.S. is acting the way it is only because in the *absence of world government* there is nobody to do the job. This attitude is reflected in political statements. We have to acknowledge that in the United States there is a powerful political•faction in favour of collective security[60] and not very happy with a U.S. role as

58 As e.g. Emil Brunner stated in 1943 in his *Justice and the Social Order* (English edition, New York and London: Harper & Row, 1945) (orig. 1943), pp. 235 ff.

59. *Ibid.*

60. See for example Sir Brian Urquhart, Robert Mcnamara, *Toward Collective Security: Two Views*, (The Thomas J. Watson Jr. Institute of International Studies, Brown University, Occasional Papers Number 5).

world policeman. In any event, the job is not to enforce peace by g to war.

With two World Wars having originated in Europe, a country India, if it would act on the proposition here propounded and foun in existing law, could achieve a tremendous effect. The Europeans so far have been reluctant to take steps to obtain a European perma seat in the Security Council, and delegate their powers for the purp (of achieving an effective system of collective security), would in course be forced to act also. For India, this would be a sure ticket t permanent seat in the Security Council.

# INTERNATIONAL CONVENTIONS ON THE RIGHT TO WORSHIP: A STUDY OF STATE PRACTICE IN UK, USA AND NIGERIA

A.A. OBA*

## I. INTRODUCTION

The term "international convention" is used here in the broad sense of "treaty". Greig explained the terms thus:

> The expression "treaty" is used as a generic term to cover a multitude of international agreements often referred to by a confusing variety of names. Some treaties are called treaties, but others are termed conventions or protocols, declarations, charters, conventions, or pacts; sometimes a treaty is referred to as an agreement, but on other occasions as a *modus vivendi*, an exchange of notes, or a memorandum of agreement.[1]

The right to worship is one of the features of the right to freedom of religion. Freedom of religion itself is usually expressed as an integral part of the right to freedom of thought, conscience and belief which in turn is one of the established fundamental human rights.

The right to freedom of religion in an empty right if the right to worship is not properly secured or if obstacles are placed in the way of practical worship.

Since the end of the Second World War, there has been a remarkable development in human rights. This development is reflected in the increasing number of international conventions on human rights. The right to freedom of religion is one of the important rights which has enjoyed a lot of attention on the international arena in the past few decades.

This paper highlights the principal international conventions on the right to freedom of religion with particular reference to the right to adequate period for worship and examines the practice in some selected countries namely, America, Britain and Nigeria.

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1. D.W. Greig, *International Law*, 2nd ed., (London, 1971), pp. 450-1.

## II. THE INTERNATIONAL CONVENTIONS[2]

The principal international conventions on freedom of relig includes:

1. The United Nations Charter (1945);
2. The Universal Declaration of Human Rights (1948);
3. The European Convention on Human Rights (1950);
4. The International Covenant on Civil and Political Rights (196
5. The Declaration on the Elimination of all Forms of Intolerar and of Discrimination Based on Religion and Belief (1981); a
6. The African Charter on Human and Peoples' Rights (1981).

Apart from the African Charter, all others are the products of same intellectual movement. The Declaration on the Elimination of Forms of Intolerance and of Discrimination Based on Religion and Bel ("the 1981 Declaration") is essentially a codification and extension the rights relating to religion and beliefs embodied in the previo conventions.

Article 1 of the 1981 Declaration states the right to freedom religion as follows:

1. Everyone shall have the right to freedom of thought, conscien and religion. This right shall include freedom to have a religi or whatever belief of his choice, and freedom, either individua or in community with others and in public or in private, manifest his religion or belief in worship, observance, practi and teaching.
2. No one shall be subject to coercion which would impair h freedom to have a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subje only to such limitations as are prescribed by law and a necessary to protect public safety, order, health or morals or t fundamental rights and freedoms of others.[3]

The right to freedom from discrimination on grounds of religion beliefs are stated in Article 2 of the Declaration:

1. No one shall be subject to discrimination by any state, instituti group of persons on the grounds of religion or others beliefs

2. For text of most of these conventions see: Brownlie, *Basic Documents on Hum Rights*, 2nd. ed., (Oxford, 1981).

3. See similarly, Art. 1(3) UN Charter; Art. 18 UDHR and Art. 9 ECHR.

4. Similarly, Art. 1(3) UN Charter; Art. 18 UDHR and Art. 14 ECHR.

2. For the purposes of the present Declaration, the expression "intolerance and discrimination based on religion or belief" means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.

Article 6 of the Declaration further provides that freedom of thought, conscience, religion or belief includes *interalia* the freedom

(h) To observe days of rest and celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief.

The Declaration further enjoins all States to take steps to ensure that rights declared in the Declaration are secured in their respective countries. Article 4 states the obligation thus:

1. All States shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life.
2. All States shall make efforts to enact or rescind legislations where necessary to prohibit any such discrimination, and to take all appropriate measures to combat intolerance on the grounds of religion or other beliefs in this matter.

The African Charter adopts a completely different phraseology in its definition of the right to freedom of religion. Article 8 thereof makes this forceful statement:

> Freedom of conscience and the profession of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

These conventions serve as the basis of our examination of the practice in selected States, but before such examination it is necessary to identify the occasions mandated for worship by the leading religions in those countries.

## III. THE HOLY DAYS

Three days have featured prominently as the days of worship for the predominant religions. The days are Saturday, Sunday and Friday for the Jews, the Christians and the Muslims respectively.

Jews and Christians regard the *Sabbath* as a holy day and a day of rest when no work is to be done. The Biblical basis of this is the Fourth

Commandment which declares:

> Remember the *Sabbath* day, to keep it holy. Six days you sha labour, and do all your work; but the seventh day is a *Sabba* to the LORD, your God; in it you shall not do any work.[5]

The Jews and some Christian sects associate Saturday wit *Sabbath*, while the dominant Christian views regard Sunday a *Sabbath*.[6]

To the Muslims, Friday is a special day. It is, however, not a *Sa* when no work is to be done, rather it is a day for work and wo The Quran states the Friday obligation thus:

> O ye who believe! When the call is proclaimed to prayer o Friday 'the Day of Assembly), Hasten earnestly to th Remembrance of God, and leave off business (and traffic): Tha is best for you if ye but knew!
>
> And when the Prayer is finished, then may ye disperse throug the land, and seek of the bounty of God: and celebrate the Praise of God often (and without stint): that ye may prosper.[7]

The obligation on Muslims in respect of Fridays is to work norn but only to cease when it is time for the Friday Prayer, and afte prayers normal business resumes.

Apart from the days mentioned above, there are some other an festival days for the religions. Jews and Christians regard their fes days as days when no work is to be done while Muslims have no relig reasons to refrain from work on their festival days but they must a the special religious duties (if any) on such days.

## IV. THE PRACTICE IN SELECTED COUNTRIES

### A. Britain and America

#### 1. Sunday

Under the common law, Sunday has always been regarded as a *non jurisdicus*.[8] In Britain, various pieces of legislation enforce Su

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5. *The Holy Bible*, RSV (Michigan, Zondervan, 1971), Exodus, 20:8-10.
6. A. Bradney, *Religions, Rights and Laws* (Leicester, University Press, 1993), p
7. *The Holy Quran*, 62:9-10 (Yusuf Ali's Translation).
8. A day when no judicial act can be performed: *Town of Danville* v *Brown* 12 503, 505.

as a work-free day. These include the Sunday Observance Acts of 1677 and 1780, the Shop Act, 1950 and the Factories Act, 1961. Starting from the 1780 Act, there has been a gradual relaxation of the compulsory work-free aspect of the Sundays laws. The reason for this is the declining hold of Christianity on the populace. Bradney says:

> For some, Sunday continues to retain its *Sabbatarian* flavour. Such individuals, however, constitute only a part of what is, in any event, the small minority of the British population who continue to worship regularly in a Christian Church.[9]

In 1985, an attempt was made to do away with the remaining restrictions on trading on Sundays. The Bill was successfully opposed by the Churches. The arguments advanced by the Churches were couched in secular rather than religious terms.[10] They emphasised the need for rest and the usefulness of preserving a day in the week for that purpose.

In America, the observance of Sunday as a compulsory non-trading day is statutorily entrenched in many of the states. These Sunday Closing Laws have been upheld by the courts in spite of the provisions of the First Amendment to the US Constitution which provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...

Similarly, secular arguments were adopted by the courts. In *McGowan* v *Maryland*[11] and three related cases the Supreme Court sustained Sunday Closing Laws dismissing the arguments that they violated freedom of religion and equal protection of law and also that they constituted an establishment of religion. The Court's judgment in the four cases cover 222 pages.[12] The Court concluded that:

> In the light of the evolution of our Sunday Closing Laws through the centuries, and of their more or less recent emphasis upon secular considerations, it is concluded that as presently written and administered, most of them, at least are of a secular rather than of religious character, and that presently they bear no relationship to the establishment of religions as those words are used in the Constitution of the United States...[13]

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9. Bradney, *note 6*, p. 106.
10. *Ibid.*
11. 366 US 420, 81 S.Ct 1101, 6 L. Ed 2nd 393 (1961).
12. A B Saye, *American Constitutional Law: Cases and Text* (2nd ed) p. 294. The other cases include: *Braunfeld* v *Brown* 366 US 599, 81 S.Ct 1144 6 Ed 2nd 563 (1961)
13. Quoted in Saye, note 12, p.294.

In spite of the decisions of the American courts and the argur of Churches in Britian, Sunday laws cannot be divorced from the of the Christian *Sabbath* which those laws were originally mea protect. Bradney rightly sums up the position thus:

...the coincidence of the particular day chosen and the Chri *Sabbath* can hardly be dismissed as fortuitous. In the various piec legislation which refer to Sunday, other religions are simply tre less favourably than Christianity. Although the arguments put for by the main Christian Churches have become paternalistic rather theological, arguing for Sundays to be kept free of employment people's own good (whether they want that good or not), the argum continue to have a theological consquence — the protection of Christian *Sabbath*.[14]

**2. Saturday and Friday**

In America and Britiain, Saturday and Friday have no religi significance in statutory or common law. Therefore, those whose relig requires worship on these days will have to find time to do so, that their work schedule so permits. In England, there has been a serie decisions to the effect that Muslims have no right to attend Friday pra when the period falls within the hours of their employment. In *Ahma Inner London Education Authority*[15] it was argued that a Muslim sch teacher was entitled to take time off every Friday to attend mosque Friday prayers. The plaintiff/appellant relied on clause 9 of employer's (ILEA) staff code, section 30 of the Education Act, 1 and Article 9 of the European Convention on Human Rights, 1950. argument was rejected by the industrial tribunal and the Employm Appeal iribunal. His further appeal to the Court of Appeal was dismissed. The Court of Appeal (Lords Denning and Orr, with L Scarman dissenting) held that the three provisions relied upon do confer such right on the plaintiff/appellant. The provisions are follows:

Clause 9 of the staff code:

> Religious observance: Teachers... who, for reasons of conscience, have objections to working on a particular day in term time, it being a day of special obligation in their religion, shall be allowed to leave with pay on the understanding that such leave shall be restricted to days which are generally recognised in their religion as days when no work may be done.

14. Bradney, note 6, pp. 106-107.
15. [1978] 1 Q.B 36.

Section 30, Education Act, 1944:

> ...no teacher in any such [county or voluntary] school shall be required to give religious instruction or receive any less emolument or be deprived of, or disqualified for, any promotion or other advantage by reason... of his attending or omitting to attend religious worship;...

Article 9, European Convention on Human Rights:

> 'Every person has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or in private, to manifest his religion or belief in worship, teaching, practice and observance. (2) Freedom to manifest one's religion or beliefs shall be subject only such limitation as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedom of others. All, these provisions were considered before it rejected the plaintiff's contention. Lord Orr said that clause 9 could not be availed of by the appellant because Friday "far from being a religious holiday for Muslims, is a day on which they are enjoined after attending prayers to return to work"[16]

On section 30 of this Education Act, lord Denning held thus:

> If the words [of the section] were read literally without qualification, they would entitle Mr Ahmad to take time off every Friday afternoon for his prayers without loss of pay. I cannot think that this was ever intended,... I think that section 30 can be applied to the situation perfectly well by reading it as subject to the qualification "If the school time-table so permits". So read, it means that he is to be entitled to attend for religious worship during the working hours if it can be arranged consistently with performing his teaching duties under his contract of employment.[17]

Lord Orr concurred with this interpretation by saying that the section "cannot be construed as authorising a breach of contract by a teacher in

16 *Ibid*, p. 44.

17 *Ibid*, p. 40.

absenting himself during school hours for the purpose of attendi religious worship."[18]

On Article 9 of the European Convention on Human Rights, Lo Denning held as follows:

> The Convention is not part of our English law, but as I have often said, we will always have regard to it. We will do our best to see that our decisions are in conformity with it. But it is drawn in such vague terms that it can be used for all sorts of reasonable claims and provoke all sorts of litigation. As so often happens with high-sounding principles, they have to be brought down to earth. They have to be applied in work-a-day world... Applied to our educational system, I think that Mr Ahmad's right "to manifest his religion in practice and observance" must be subject to the rights of the education authorities under the contract and to the rights of the children whom he is paid to teach. I see nothing in the European convention to give Mr Ahmad any right to manifest his religion on Friday afternoons in derogation of his contract of employment: and certainly not on full pay."[19]

Lord Scarman in his dissenting judgment gave this view:

> Since 1944 the United Kingdom has accepted international obligations designed to protect human rights and freedoms, and has enacted a series of statutes designed for the same purpose in certain critical areas of our society... They were enacted after the United Kingdom had ratified the European Convention on Human Rights... and in light of our obligations under the Charter of the United nations. Today, therefore, we have to construe section 30 [Education Act] not against the background of the law and society of 1944 but in a multi-racial society which has accepted international obligations and enacted statutes designed to eliminate discrimination on grounds of race, religion, colour or sex. further it is no longer possible to argue that because the international treaty obligations of the United Kingdom do not become law unless enacted by Parliament our courts pay no regard to our international obligations. They pay very serious regard to them: in particular, they will interpret statutory language and apply common law principles, wherever possible, so as to reach a conclusion consistent with our international obligations.[20]

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18. *Ibid*, p. 45.
19. *Ibid*, p. 41.
20. *Ibid*, p. 48.

Lord, Scarman, therefore, rejected the narrow construction placed on section 30 by the other judges of the court:

> In modern British society; with its elaborate statutory protection of the individual from discrimination arising from race, colour, religion or sex, and against the background of the European Convention, this is unacceptable, inconsistent with the policy of modern statute law, and almost certainly a breach of our international obligations.[21]

On further application to the European Commission, the Commission in *Ahmad* v *UK*[22] dismissed the application at the admissibility stage holding that in relying upon the applicant's contract of employment, the UK, had not arbitrarily disregarded the applicant's freedom of religion as protected by Article 9 of the European Convention on Human Rights.[23] Generally, attempts by Muslims to secure their right to attend *Jummat* prayers and the other daily prayers during the working hours have proved unscessful.[24]

The Jews and others who hold Saturday as the *Sabbath* have the same problems as Muslims have with Friday. In *Esson* v *United Transport Executive*[25] the dismissal of bus conductor because he asked to be exempted from work on Saturday (having converted to the Seventh Day Adventist faith) was upheld. The court held that his request amounted to a breach of his contract of employment and that his failure to work on Saturdays places undue burden on other employees. Other Saturday cases have followed the same line.[26]

In America, Friday have not come up as a major issue, but Saturdays have featured prominently. In *Sherbert* v. *Verner*,[27] member of the Seventh-Day Adventist Church was discharged by her employer because she would not work on Saturday. Her claim for unemployment benefit was rejected by the South Carolina State Employment Commission on the ground that she would not accept suitable employment when offered. The State courts upheld the State's contention. The Supreme Court, however, rejected the argument. The court held that the State's attitude

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21. *Ibid*, p. 50.
22. (1982) 4 E.H.H.R 126.
23. S.H. Bailey, D.J. Harris and B.L. Jones (eds), *Civil Liberties: Cases and Materials* 3rd ed, p. 555.
24. For example: *Ali and Ords* v *Capri* and *Hussain* v *London County Bus Services Ltd* cited in Brandney, note 6, pp. 108, 117.
25. [1975] I.R.L.R. 48, (IT) cited in Bradney, note 6, p. 108.
26. Such as *Post Office* v *Meyer* cited in Bradney, note 6.
27. 374 US 398, 83 S. Ct 1970, 10 L. Ed 2nd 965 (1963).

amounted to an abridgement of this appellant's right to the free exer of her religion.

The right to "time off" during working hours is, however, a diffe matter. The 1964 Civil Rights Act provides that an employer must m "reasonable accommodations" to the religious needs of his employ In *Trans World Airlines* v. *Hardison*[28] it was held that this provis does not require an employer to establish a four day work week fo Seventh Day Adventist or to shift the working hours of other employ in disregard of seniority rights.[29]

The position in both Britain and America is, therefore, similar. Christian *Sabbath* is secured as work free day while Friday and Satur are not so treated.

### 3. Religious holy days

In England, all important Christian festivals are observed as pub holidays. Thus for Christians ample provisions have be institutionalised to ensure that they are able to fulfil their religious dut on their holy days.[30] Other religions are at disadvantage. Their adhere are forced to fight individually for this right. The *causus classicus* this issue is the case of *Prais* v *EC Council*.[31] The case, which w decided by the European Court of Justice, concerned a British nation who had applied for a job in the European Communities as a translat She was invited by a letter dated 23 April 1975 for written examinati scheduled to be held on 16 May 1975. She replied by a letter dated April 1975 that she would be unable to attend on 16 May because th day was a Jewish holy day and that she was a Jewish. The Coun replied that they are unable to -- for administrative and security reaso -- offer an alternative date for the examination. The court held that s ought to have informed the Council of the unsuitable dates before t Council fixed the date and that since the appointing authorities did n have any notice of the unsuitability of the dates, her case *before* t court must fail. This decision was adopted in *Ostreicher* v. *Secretary State for Environment*[32] where the court held that the plaintiff ought have given the defendant notice of the objection to a proposed date good time. The plaintiff's argument based on Article 9 of the Europe Convention on Human Rights was rejected by the court saying that t

28. 432 US 63, 97 S.Ct 2264 and 53 L.Ed 2nd 113 (1977).
29. Saye, note 12, p. 282.
30. Bradney, note 6, p. 104.
31. [1976] ECR 1589, [1976] 2 CMLR 708, European Court of Justice.
32. [1978] 3 All ER 82.

article was "of little assistance because it does not apply and moreover it is in vague terms"[33]

In America, Christians have ample opportunities to fulfil the requirements and obligations of their festivals and holy days. The religious aspect of holidays is generally recognised.[34] In *Laubish* v. *Roberto*[35] the following definition of holiday was advanced:

> The term 'holiday' has reference to days set apart for worship, reverence to memory of great leader and benefactor, to rejoice over some great national or historical event, or to rekindle flame of an ideal[36]

Similarly, in *Lamberti* v. *City of Stamford*[37] the court said:

> A holiday is a day on which ordinary occupations are suspended, a day of exemption or cessation from work, a day of religious observance or of recreation or amusement.[38]

Legal holidays are holidays of "somewhat special character"[39] These included major Christian festivals such as Christmas,[40] the New Year's day and January 2, whenever the New Year's day fell on a Sunday.[41]

Holidays in the general sense as distinguished from legal or statutory holidays may be created by general acceptance and observance,[42] or observance amounting to a common law custom.[43]

Religions other than Christianity do not enjoy the privilege of having their religious festival days declared as legal holidays or observed as holidays by custom.

### B. Nigeria

In Nigeria, the State is under a duty to ensure that there is adequate opportunity for the observance of religious festivals. Section 17 (3) (a) of the 1979 Constitution provides that:

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33. Bailey, *et al* (eds), note 23, pp. 555-558.
34. See generally, *Corpus Juris Secundum* vol, 40 p. 410.
35. 277 p. ed. 9 (also see: *vidal* v *Bucks* 21 p. 2d. 952, at. 955).
36. *Ibid*, p. 14.
37. 4 A. 2d. 190.
38. *Ibid*, p. 192.
39. *Reitchmiller* v. *People* 6. N.W 667, 668.
40. *Ibid*, p. 668.
41. *Puritan Chocolate Co* v. *Samuel* 182 N.E. 322, 323.
42. *Schwaner* v *Kerr* D.C 170 F. 92, 100.
43. *St Louis, B & M.R.Co* v *Hicks*, Tex Civil App. 158 S.W. 192.

The State shall direct its policy towards ensuring that -

.......................................

(b) conditions of work are just and humane, and that there are adequate facilities for leisure and for social, religious and cultural life;

Section 35 also declares the fundamental right to freedom of religio which right includes the right to manifest one's religion in "practic and observance" However, the observance of Friday, Saturday an Sunday as days of religious significance have been secured before th enactment of the 1979 Constitution.

Since the colonial era, Sunday and all other Christian festivals hav been observed as public holidays.[44] Muslims too have secured the righ to attend Friday prayers while Muslim festivals such as the *Id-ul-fitr* *Id-ul-Kabir* and the *Mulud* (birthday) of the Prophet (SAW) have come to be accepted as public holidays.[45]

In 1979, labour matters were transferred from the concurrent or regional list to the exclusive list by the Constitution.[46] Even before this, the Public Holdiday Act [47] promulgated earlier that year, was made applicable to the whole Federation while the regional Public Holidays Laws were repealed.[48] The Act codified the laws relating to public holidays and included Saturdays as work-free days as a concession to groups such Jehovah's Witnesses and the Seventh-Day Adventists who regard Saturday as the *Sabbath*.[49]

The Public Holiday Act, however, states that one may be required to work on Sunday and Saturday "If the interest of the public service or convenience of the public demands it".[50] Section 41 of the Constitution also places a general limitation on fundamental rights. It states that nothing in the fundamental rights provisions (which include section 35) "shall invalidate any law that is reasonably justifiable in a democratic society... in the interest of defence, public safety, public order, public morality or public health". In *Dickkson Ojiegbe and Anor* v. *Marcus Ubani and Anor*[51] the Federal Supreme Court held that the holding of

44. See cap 137, Laws of Southern Nigeria, 1908 and cap. 67, Laws of Northern Nigeria, 1910.
45. For example see: the Schedule to the Public Holiday Law, cap. 110, Laws of Northern Nigeria, 1963.
46. Items 32 and 57 (a), Second Schedule to the 1979 Constitution.
47. Decree No. 3 of 1979; now cap. 378, Laws of the Federation of Nigeria, 1990.
48. *Ibid.*
49. *Ibid*, section 4.
50. *Ibid*, section 6 (1).

election on a Saturday did not violate the plaintiff's right to freedom of religion even though Saturday is considered to we holy by the plaintiff's religion. Aguda, commenting on this decision, says:

> Surely no one can quarrel with that decision, for had that [Plaintiff's] argument been accepted there probably would have been no day of the week in which any elections could be held- - a direct negation of democracy -- for it is most likely that every day of the week is regarded by one or the other religious group as sacred".[52]

In spite of this view, it is submitted that the decision can no longer be the correct position. The case was decided before the permutation of the Public Holidays Act which has now made Saturday a work-free day. Aguda's argument too does not appear to be valid. For it is based on suppositions which have no basis in reality. Apart from Friday, Saturday and Sunday, no other day in the week is regarded as "sacred" by any religious groups, therefore no real danger is posed to democracy or public good if the rights of those who consider Saturday as the *Sabbath* are respected and elections held on any of the 'neutral' days of the week.

## V. IMPACT OF INTERNATIONAL CONVENTIONS

International conventions have not played a decisive role in shaping the practice of the states under review; rather, historical and social factors have been the major determinants in a state's policy on the right to freedom of religion.

Many reasons may be recounted for this state of affairs. In the first place, the freedom of religion as a subject of international conventions is a relatively new development. And then, international conventions are not meant to be a substitute for municipal laws.[53] They are not drafted in the precise manner of municipal legislation and are vague and generally difficult to define in practical terms.[54] International conventions drafted under the auspices of the United Nations do not contain provisions for enforcement. Rather, enforcement is left to the

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51. [1961] 1 All N.L.R 227.

52. T A. Aguda, *The Judiciary in the Government of Nigeria* (Ibadan, New Horn, 1983), pp. 49-50.

53. Khan, *Islam and Human Rights* (Surrey, IIP, 1988), p.12.

54. U.O. Umezurike, "The Present State of Human rights in Africa", *Calabar Law Journal* vol. 1, No. 1 (1986), p. 66, and Lord Denning, *What Next in the Law* (Butterworths, 1982), p. 291.

members states.[55] Thus Lord Denning said this on the Univers Declaration of Human Rights:

> That Universal Declaration was absolutely useless for one decisive reason. There was no means of enforcing it. There was no court to give orders. There were no litigants to appear before it. There were no police to arrest offenders. Any one of the nations who signed it could cock a snook at it. And many did so. It can be expunged from any list of Bills of Rights. It was a declaration of pious aspirations — not of enforceable rights."[56]

The attitude of the United Nations is that each state should ensu compliance with fundamental rights within its territory. Article 56 c the Charter states that all Members pledge to take joint and separat action for the promotion of universal respect for fundamental rights Regional bodies have, however, made progress in enforcing thei conventions. The European Convention is now enforceable by th European Court of Justice.[57] The African Charter made under th auspices of the Organisation for African Unity also has procedure fo its enforcement.[58]

The Universal Declaration of Human rights is not 'useless'. For one thing, it has served as the basic document in human rights in internationa law. The document was not meant to be a Bill of Rights rather it was meant to inspire world-wide compliance with human rights. The Declaration has been serving this purpose. For example Article 9 of the European Convention is really nothing but an improved version of Article 10 of the Declaration, while the freedom of religion provisions embodied in section 39 of the 1979 Nigerian Constitution are almost a complete *verbatim* reproduction of Article 9 of the European Convention

## VI. CONCLUSION

In practical terms, international conventions have not been useful as they should, as a basis for enforcement of the right to worship. Apart from the limitations highlighted above there is unwillingness in America and England to accord respect for international conventions relating to freedom of worship in their municipal laws. Rather they are relying on

55. Khan, note 53, p, 278.
56. Denning, note 54, p. 278
57. *Ibid*, p. 279 and see also I.N. Stevens, *Constitutional and Administrative Law* (M & E, 1982), pp. 150-152.
58. Article 45 of the Charter, see cap. 10, Laws of the Federation of Nigeria 1990.

their existing local laws instead of enacting the relevant international conventions into local legislation or enacting new local legislation in light of modern developments on the international fora: Their attitude is that this existing legislation is sufficient compliance with their international obligations to ensure freedom of religion, even where this legislation was drafted long ago, in different social and political circumstances. The legislation a product of another time is often completely inadequate in a modern, pluralistic, multi-religious society. The result of such obsolete legislation and the consequence of unwillingness to bow to international conventions was apparent in *Ahmad's* case.

The multi-religious background of the Nigerian society has ensured a wider protection of the right to worship. In this regard, Nigeria is much more advanced than America and England, although, prejudice and discrimination have not completely been eradicated as shown in *Ojiegbe's* case.

In order to secure freedom of worship the world over, there is a need for redefinition of this right in international conventions in a more concrete manner. In the final analysis, however, international conventions are not as important as the willingness of states to accept the multi-religious nature of the contemporary world and to display the tolerance and understanding necessary to accommodate the various religious groups resident in their territories.

# REVIEW ARTICLE

# TERRITORIAL ACQUISITION, DISPUTES AND INTERNATIONAL LAW*

SUBHASH C. JAIN**

During the past few centuries, international law has develo certain specific legal norms to regulate the problem of establish exclusive title to territory. These norms, according to the aut basically refer to the modalities of acquisition (such as discove symbolic annexation, contiguity and occupation) and transfer (such prescription, cession, conquest and self-determination) of territo Through the application of these rules and modalities, the internatio community seeks to achieve "the maintenance of a stable territorial or with a minimum of disputes and violence in international territo relations (minimum order) and full enjoyment and most efficient use the resources of territory (optimum order)" (p.v). As the author clai this book "purports to examine the process of international l governing the establishment of exclusive control over territory fr the stand point of these policy perspectives." (*Id.*) More concretely, main focus of the book is on two aspects: (*i*) description of the traditio critieria of territorial acquisition and proving that they are inadequ in modern times; and (*ii*) brief examination of contemporary territo doctrine and conflicts. The book's overall emphasis is on "the need regard territorial acquisition as a comprehensive process entailin consideration of the multitude of factors and the employment of a num of modalities of acquisition and transfer, singly or in combinati resulting in the establishment of complete control over territory." (*I* The author has expressed a strong conviction that the "process approa has obvious advantages and adds to the development of the law territorial acquisition.

The chief merit of the book lies in the recommendation concerni the application of "process approach" in resolving territorial conflic This approach takes into account changes that are taking place in international relations ever since the days of colonialism and the

* This article reviews the book by Surya P. Sharma, entitled *Territorial Acquisiti Disputes and International Law* (Martinus Nijhoff Publishers, The Hague, Bost London, 1997), pp. 353 + XVIII + Index.

** Of the Board of Editors. Member Secretary, Law Commission of India and Secre to the Government of India, Ministry of Law, Justice and Company Affairs, N Delhi. The views expressed here are those of the reviewer.

changes are closely related to the resolution of territorial disputes, old or new. The author has rightly pointed out that many of the pending disputes are complex involving "multifaceted claims and counter-claims". While some disputes present a picture of a clash between traditional principles *Vs.* a new set of values, others reveal a mix of a wide variety of circumstances, such as historical, economic, social, cultural and religious. All this makes it difficult for decision-makers to render 'a clear and rational decision," because the above mentioned features of disputes require flexible solutions. The author claims that "the process approach"—which involves taking into account of all relevant factors, legal or non-legal, in a systematic manner and rendering decisions by applying the test of reasonableness (viewed from the perspective of a stable and peaceful territorial order) in a total context—can provide the decision-makers with a needed flexibility in this work." (p.342) His conclusion is that if "the decisions ultimately arrived at are rational; as against arbitrary, and are acceptable to all parties, they might make a significant contribution to the doctrine of territorial acquisition." (*Id.*)

Turning to specific chapters, chapter I (Introduction) contains a discussion on the importance of international territorial disputes in the post-cold war setting. The author's view is that despite pressing integrationist trends currently in operation in the world arena, the traditional model of territorial order based on the principle of state sovereignty stands firm (p.327). Also, the territorially oriented view of international law continues to retain its pivotal position. This is evident from the fact that a large body of international rules and policies still remain founded upon the territorial exclusivity of the state whose aim is to produce and protect the traditional structure of the global territorial order. His conclusion is that as long as the principle of territorial sovereignty remains a dominant international prescription, issues relating to title to territory and the modalities of acquiring or transferring them may continue to dominate international law (p.329). This chapter addresses two other problems. The first relates to the distinction between a boundary dispute and a territorial dispute which figured in some of the recent cases decided by the International Court of Justice. The author's view is that, for achieving clarity in thought and rationality in decision, it will be desirable to maintain a distinction between these two categories of disputes, although in a particular context they may overlap (p.329). Such a distinction helps decision-makers select a right combination of factors and apply appropriate legal prescriptions and policies leading to rationality in decision (*Id.*) The other problem discussed is whether there is any realistic distinction between a legal

and political/territorial dispute, especially in terms of the criteria appli in their resolution. The author's answer is in the negative. He stat "The proceedings of the international courts and tribunals reveal t both legal and non-legal considerations play their role in shapi decisions in territorial matters" (p.330).

Chapter II contains an exclusive discussion on the historic development of the traditional modes of establishing exclusive title territory and it examines indepth their current legal status. The speci modalities discussed are: discovery, symbolic activities, contigui occupation, prescription, *uti possidetis juris*, equity, cession, accreti and conquest. The discussion in the chapter is accompanied by a va body of the opinion of scholars, past practices of states and judici decisions. With specific reference to the mode of contiguity, the auth has pointed out that in the past claims to islands located within t territorial waters of states were occasionally made solely on the grou of their physical location close to the shores of those states. He ad that more recently, with the extension of permissible maritime jurisdicti upto 200 nautical miles in the name of the exclusive economic zone the continental shelf, there is an increasing trend of coastal stat claiming their sovereignty over any island lying within 200 nautic miles limit (p.332). According to the author, there is no poli justification for such extravagant claims and the issue of sovereign over such islands should be decided by applying the same tests as the case of any territorial dispute on land, which means that the claima country must fulfil the requirement of a continuous and peaceful displ of sovereignty over the disputed island territory (p.332, see also pp.5 and 61). Of course, contiguity or continuity can raise, in certain specif contexts, a prescription of facts or create *animus occupandi* that particular state is exercising or displaying state authority over t adjoining territory, but this prescription is subject to be rebutted b evidence favouring the contention of the opposite party in the dispu (pp. 332-33). Regarding the mode of occupation, the author h emphasized that it has been established law for some centuries th *effective occupation* of a *terra nullius* territory is a lawful mode for t original and exclusive acquisition of territory. Anything less tha effective occupation and use of territory will not suffice to perfect title. Effective occupation, according to the author, is not a single a but a comprehensive process of establishing exclusive control ov territory which may cover a wide range of activities spreading over substantial period of time (p.333). However, the kinds of acts and t extent of activity necessary to make occupation of territory effecti will vary according to the circumstances (p.75). The principle of *u*

*possidetis juris*, meaning the territorial status as existing on the day of independence was the popular and time-honoured mode on the basis of which claims to territory were made in Latin America, notwithstanding its mixed success in that continent. In recent times, this doctrine has been transplanted in Africa (*Id.*). A chamber of the ICJ endorsed it in 1986 in the *Frontier Dispute* case between Burkina Faso and the Republic of Mali, calling it a firmly established principle of international law where decolonization was concerned (*Id.*). The principle has figured in two subsequent cases of the ICJ in Africa. While the ICJ has been according increasing importance to this principle, some scholars, as pointed out by the author, have cast doubt about the status of this doctrine (pp.333-334). With respect to conquest, it is well understood that international law prohibits the use of unilateral force in seeking changes in the territorial relations between states. On the other hand, the consequential doctrine of non-recognition of the fruits of agression is gradually acquiring definite form, although some scholars continue to debate the effects of this principle. The author has made a useful suggestion in this regard: "If the United Nations Charter is ever revised the doctrine of non-recognition of the fruits of aggression should be firmly incorporated in it with no reservations or qualifications" (p.334).

Chapter III provides a critical review of the traditional modes of acquiring and transferring territory as discussed in Chapter II. The author has stated that most of these modalities were the products of colonial powers and were especially designed to meet their specific *inter se* needs. (p.vi) As the power structure of the international society started changing, the traditional modalities and rules began to reveal fundamental defects, which the author enumerates in this chapter. Significantly, the author has emphasized that owing to top-heavy rigid structure of the traditional modes, and prevailing conceptual confusion associated with them, international courts and tribunals have not followed the traditional categorizations and have avoided stating categorically under precisely what specific head (modality) they were awarding the territory to a party in a specific dispute (p.335). In their quest for reformation and refinement, some leading scholars have recommended alternative approaches or theories, which have been critically examined by the author in the final part of the chapter (p.173).

Chapter IV of this book is most bulky and important too. The discussion is placed under six headings, namely, (1) Introduction; (2) Major Features of Contemporary Process of Territorial Acquisition; (3) Sources of the Law of Territorial Acquisition; (4) Self-Determination and its Many Forms; (5) Fundamentals and Advantages of the "Process" Approach; (6) The Major Contemporary Territorial Disputes (in Asia,

Africa, Latin America) — Claims and Legal Perspectives.

The author has stated with emphasis that in actual practice, co and tribunals, in the face of competing claims by parties, base th decisions upon the evidentiary process and ward the territory to a s which can adduce comparatively stronger evidence (p.335). T approach of awarding the territory on the basis of balancing and preponderance of evidence is evident in all the major decisions involv issues of territorial sovereignty. Since the balancing of evidence invol consideration of multiple factors, the author seeks to make out a case favour of treating the acquisition of territory or sovereignty a comprehensive process leading to the establishments of exclusive cont over territory (p.336). The author also outlines the major features this process and discusses its advantages (see pages 185-189; 249-25

As regards the sources of the law of territorial acquisition, the aut divides the discussion into three parts: (a) General Prescriptions; More Specific Criteria and their Sources; and (c) Criteria Applied International Tribunals. Some general principles of territorial acquisiti were laid down in the early cases on territorial sovereignty, i.e., *Island of Palmas* case, the *Clipperton Island* case, the *Eastern Greenla* case, and the *Minquiers and Ecrehos* case. In a recent case, the *La Island and Maritime Frontier Dispute* case between E1 Salvador a Honduras, a chamber of ICJ, according to the author, appeared underplay the importance of the above rulings by stating that previous law was developed primarily to deal with the acquisition sovereignty over *terra nullius* (p.337). But the author argues that principles laid down in those cases — those relating to the conditio of establishing extensive control or occupation — were so fundamen that they apply in *terra nullius* as well as other territorial situatio (p.337). Moreover, these inherited principles, alongwith some oth traditional modalities of acquisition, are still relevant in deciding uses (p.337). The guidance for evolving specific criteria to be appli can be found in various sources: Article 38 of the Statute of the I explicit agreements (*compromis*) stating the terms of reference submitting cases before the ICJ or arbitral tribunals, decisions of t post-war conferences and similar institutions and decisions international courts and tribunals (p.339). Occassionally, tribunals fi customary and conventional law to be either inadequate or non-existe In that case, the tribunals go to the extent of devising practical solutio based on expediency, or interpret their authority widely so as to per a decision based on other criteria (p.340). The author claims that in *Rann of Kutch* case a portion of the disputed territory was awarded Pakistan more on the basis of expediency than on law. In the *La*

*Island and Maritime Frontier Dispute* case of 1992, the chamber of the ICJ, interpreting its authority widely, took into account even the post-critical data evidence (p.340).

The author argues that where the evidence based on conventional or customary law or on some recognized criteria such as *uti possidetis juris*, is found to be inadequate or inconclusive, concepts based on the unilateral conduct of the parties, namely, recognition, acquiscence, preclusion, estoppel, consent, self-determination, etc. have been applied by tribunals in resolving cases of territorial sovereignty (p.340). While some scholars have expressed serious reservations about the efficacy of these criteria, there is an increasing trend in the decision-making of the ICJ (earlier the PCIJ) to attach decisive or conclusive value to these concepts. The latest case, the author cites in support of his assertion, is that of *Land, Island and Maritime Frontier Dispute* case (1992) (p.340).

In short, courts and tribunals usually apply two types of criteria to resolve territorial disputes. The first takes the form of technical concepts (mentioned above). The ICJ has applied them in a number of cases and their legal status is beyond doubt (p.210). The other criteria, frequently applied by the ICJ and other tribunals, involve taking into account historical, economic, social and cultural factors. Some writers prefer to call them "political" rather than "legal". According to the author, there is no meaningful distinction between the two. The fact of the matter is that the international law of territory has been predominantly developed by the above factors (the so-called political considerations) and as such, these criteria are eligible in the legal sense to be taken into consideration by all tribunals (p.221). In the view of the author, they amount to ties of a legal nature (p.211). Authorized or not, in reality international political as well as judicial and arbitral tribunals do regularly apply the criteria of administrative, geographical, social and economic links to the territory in concrete cases (p.211).

Because of the growing importance of the new principle of self-determination as a modality for transfer of territorial competence from one entity to another, the author has devoted a separate section to it. This section examines its status in the colonial as well as non-colonial setting. The exercise of self-determination in the former context is now regarded as undisputed. In fact, self-determination has become a pre-emptory norm of international law. In the non-colonial setting, it has assumed a number of new forms, some with territorial connotation and some without, for instance, secession, non-sovereign autonomy (rights of indigenous people), minority rights, formation of new states by dissolving the existing state, democratic self-governance, right to democracy and so on (p.vii). This section, according to the author, seeks

to prove that self-determination, *when applicable* is a right un international law and its exercise can be fundemantal to the law territorial acquisition, as also to the emerging human rights law protecting specific demands of groups and sub-groups withi sovereign state (p.vii). Also, the author has examined the legal status each form of self-determination. The test suggested by him is: "T main elements for determining the legitimacy of each form of se determination demand are the degree of representative extent of government of a country and the amount of destablization or disrupt of public order each change will produce if the claim is accepte (p.341).

Another section is devoted to dealing with major contempor territorial disputes in all continents. The author has analysed facts a claims and counterclaims involved in those disputes following traditional classification of modalities of acquisition of territory. Wh no attempt has been made, the author states, to provide a final assessm or judgment in each case or controversy (which would require writi a separate book), only possible legal approaches and perspectives t could be applied in their resolution have been highlighted (pp.vii a 342).

Chapter V deals with "The General Appraisal" of the book in t form of exhaustive statement on the entire subject of the book.

Territorial disputes are major causes of international confli threatening world peace. The author regards the territorial acquisiti as a comprehensive process where a wide variety of circumstances m have to be considered while deciding a claim. Thus no single factor c be attached overriding importance. The author is in favour of a flexil approach free from doctrinnaire underpinnings. In his view, "overridi community policy" envisages establishment and maintenance of a "wo territorial order which yields reasonable stability of titles". The autho approach to the issues discussed is constructive and objective.

Professor Sharma, who is a renowned authority on the subject, h made a significant contribution to the understanding of various issu dealt with in the present book. The students, teachers and practitione of international law are bound to immensely benefit from Profess Sharma's indepth analysis of the current state of international law the subject.

EDITORIAL COMMENT

# KARGIL CONFLICT AND INTERNATIONAL LAW*

V.S. MANI**

## I. INTRODUCTION

The current active military engagement between India and Pakistan in the Kargil Sector on the Indian side of the Line of Control (LoC) cannot be dismissed as a yet another border skirmish, nor as a "routine incident" of Pakistani artillery covering fire to enable a few Pakistani trained Kashmiri militants along with a few Afghan or other mercenaries to sneak into the Kashmir Valley in order to augment the flagging terrorist activities there. This summer the Indian army acting alone could not push out the swarms of invaders who had already crossed the LoC hardly before the snow started melting. The Indian Air Force (IAF) came to its rescue, as part of the Operation Vijay, and started the aerial bombardment of the numerous outposts and camps which had been erected/occupied by these invaders well deep in the Indian territory. It is by now well established that the invaders comprise a considerable number of both regulars and irregulars drawn from the Pakistani army accompanied by some Stinger missile wielding Taliban and other Afghan mercenaries who are reportedly paid as much as US $ 18,000 to 20,000 per head. Their objective is to cut off the supply route of the Indian army by taking control of the Srinagr-Leh National Highway by forcible occupying a large tract of Indian territory across the LoC overlooking the Kargil Heights.

In fact, the current military engagement appears to have commenced around 5 May 1999 when the Indian army sent a six member reconnaissance patrol towards the LoC no man's land on the Indian side in the Kargil sector under the command of Lt. V. Kalia. The patrol never returned. The next day, however, Radio Skardu from the Pakistani side of the LoC reported the capture of Kalia! A few days later, another recci patrol of eight soldiers, dispatched to the LoC in the Batalik area to the north of Kargil, also disappeared without any trace. It was subsequently learned that its leader, a lieutenant and another soldier fought and died covering the retreat of the rest of the patrol. Reports of

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* This is a slightly revised version of "Kargil & International Law", published in three parts in *The Hindu*, 29 and 30 June & 1 July 1999.

** Of the Editorial Board. Views contained herein are those of the author and not of the ISIL.

sightings of newly erected/occupied Pakistani tents in scores over area 7 to 100 kilometres deep into the Indian territory off the LoC sta streaming in. On 14 May, two helicopters of the Indian army w downed by the infiltrators. By the third week of May, intense hostili broke out in the area. Pakistanis, both the infiltrators as well as regular Pakistani army from across the LoC, indulged in indiscrimin firing. They hit hospitals, and other civilian targets, including the civil residents, most of whom are Shia Muslims. About 23,000 of the hapless people have become refugees in their own country, leavi their hearth and home.

After a meeting of the Cabinet Committee on Security on 25 Ma the Government of India decided to authorize its defence forces to laun the 'Operation Vijay' to flush out the infiltrators. The IAF mount aerial bombardments on the posts held by them. One of its aircraft w shot down by Pakistani missiles fired from across the LoC. Anoth developed engine failure and crashed on the Pakistani side of the Lo The pilots of both the aircraft bailed out and were caught alive by t Pakistani army. One of them, Ajay Ahuja, was shot dead in cold blo and his body handed over to the Indian army, while the other, Nachiket was taken prisoner, to be released through the good offices of t International Committee of the Red Cross (ICRC) on the eve of t Pakistani Foreign Minister's visit to New Delhi on 12 June.

This time there has been ample evidence of direct involvement the Pakistani army, even if one questions (as the Pakistani Forei Minister did at New Delhi) the admissibility of the taped telephon conversations between the Pakistani Chief of Army Staff, General Perv Musharraf (then in Beijing) and his Chief of General staff, Lt. Gener Mohammad Aziz (at Lahore). There is clear evidence of premeditati and months of planning of the Kargil operation. Many of the India Prisoners of War (PoWs) are being held by Pakistan with their existen denied. The members of the first recci patrol led by Lt. Kalia returne home dead, with their bodies bearing tell-tale evidence of mutilatio torture and other inhuman and degrading treatment at the hands of t Pakistani army: it was an exemplary show of barbarism that shocke the public conscience.

The Pakistani perfidy in violating the established LoC in the Karg sector appears to have brought to naught the much publicised, new found camaraderie between the two countries at the Indian Prim Minister's historic bus ride to Lahore and the signing of the Laho Declaration,[1] even as Pakistani army was hatching the Kargil operatio

1. The Lahore Declaration, *The Hindu* (New Delhi), 22 February 1999, p. 8. Reproduc in *IJIL*, vol. 39, no. 1 (1999), pp. 226-27.

## II. ISSUES OF INTERNATIONAL LAW

The principal legal issues emerging from the above facts of the current India-Pakistan armed engagement are the following:- (a) the status of the LoC, (b) acts of unlawful use of force, (c) the right of self-defence, (d) deployment of mercenaries into the Indian territory, (e) violations of international humanitarian law applicable in armed conflict, and (f) the role of ICRC.

### A. The Legal Status of LoC

The LoC, an Indo-Pak euphemy for a cease-fire line of the United Nations fame, was clearly established in 1972 on the basis of as many as 19 mosaic maps agreed to by both sides. It has held the ground to this day, largely respected by both sides, save for some sporadic Pakistani artillery fire to cover the periodic infiltration of Pakistan-trained terrorist and supporting mercenaries into the Indian territory, with India often returning the fire. Pakistan now argues that the LoC has not been transcribed on to the ground terrain with any certainty. India finds this argument rather spacious, only betraying the malafides of Pakistan in justifying its current military operations into the Indian territory. How does a legal and factual boundary respected so long by both parties suddenly become unclear, uncertain, and difficult to locate on the ground? Even assuming (but not admitting) that it is so, does that permit use of force? And why was it not ever raised earlier at the bilateral level, during the 27 years of the line's existence? The relevant provisions of Article IV of the Simla Agreement of 2 July 1972 provide as follows:-

"In order to initiate the process of the establishment of durable peace, both the governments agree that:

(*i*) Indian and Pakistani forces shall be withdrawn to their [respective] sides of the international border;

(*ii*) In Jammu and Kashmir, the line of control resulting from the ceasefire of 17 December 1971 shall be respected by both sides without prejudice to the recognized position of either side. Neither side shall seek to alter it unilaterally, irrespective of mutual differences and legal interpreations. Both sides further undertake to refrain from the threat or use of force in violation of this line."

Evidently, the emphasis in the Simla Agreement on the inviolability of the LoC is at par with that of the traditional international boundary. After all, the political boundary determines the physical manifestation

of the territorial integrity of a country. The Simla Agreement, rat by both countries (and approved by the parliaments of both count highlights the absolute inviolability of the LoC and either part explicitly interdicted not to resort to unilateral measures including of force to alter it in any manner, even under the pretext of transcri it on to the ground. The only permissible way of altering or 'clarify it is primarily by bilateral negotiations and other peaceful mean may mutually be agreed.[2]

Acts of use of force by Pakistan seeking to alter the LoC is a mate breach of the Simla Agreement (within the meaning of Article 60 (3 the Vienna Convention on the Law of Treaties, 1970, leaving In totally free even to consider itself not bound by that agreement longer, should it choose to do so), and a grave violation of the princ of prohibition of force under Article 2(4) of the UN Charter as well under general international law. Further, any change of the LoC by unilateral use of force by Pakistan and consequent military occupat of the Indian territory, however temporary, is *ipso facto* and *ab in* illegal. Such occupation of the Indian territory cannot confer up Pakistan any legal title to it; it cannot be recognised by the internatio community; on the contrary, other states have an obligation not recognise the consequences of such unlawful use of force.

## B. Acts of Unlawful Use of Force by Pakistan

The principle of prohibition of the threat or the use of force, w enshrined in Article 2(4) of the UN Charter and reaffirmed in Articl (vi) of the Simla Agreement, has been further elaborated by seve consensual law-making decisions of the UN General Assembly includi in particular, the 1970 Declaration on the Principles of Internatio Law Concerning Friendly Relations[3] (the United Nations euphemy the principles of peaceful coexistence), and the 1974 Declaration the Definition of Aggression.[4]

The 1970 Declaration on Friendly Relations, besides restating Arti 2(4) of the UN Charter, emphasizes that such threat or use of fo

2. Article I(ii) of the Simla Agreement 1972. For complete text (reprinted), see *IJ* vol. 12 (1972), pp. 409-11 and for a comment on the agreement see K. Naray Rao, "Essence of Simla Agreement," *IJIL*, vol. 12 (1972), pp. 397-99.
3. UN General Assembly Resoluton 2625 (XXV), 24 October 1970 adopted acclamation. See V.S. Mani, "The 1970 Declaration on Friendly Relations : Overview", Chapter 8, in *Basic Principles of Modern International Law* (New De Lancer Books, 1993), pp. 259-353.
4. UN General Assembly Resolution 3314 (XXIX), 14 December 1974, Annex, adop without a vote.

"shall never be employed as a means of settling international issues". It characterizes a war of aggression as a "crime against peace, for which there is responsibility under international law". Indeed, this responsibility is both delictual and criminal — the criminal responsibility befalls not only on the state perpetrating the aggression but also on the high functionaries of the state including those of the armed forces at whose instance the aggression was mounted. The Friendly Relations Declaration also reminds states of their duty to refrain from war propaganda. (Article II of the Simla Agreement imposes a duty on both parties to take all steps to prevent hostile propaganda against each other). It also postulates the principle of the inviolability of boundaries and other "international lines of demarcation" such as armistice or ceasefire lines," established by or pursuant to an international agreement to which it [a state] is a party". The Loc is evidently entitled to absolute respect by Pakistan.

The Friendly Relations Declaration further reminds every state of its duty "to refrain from organising or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State". Further, "Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts...". (This postulate is also reiterated as part of the principle of non-intervention in the same declaration). there is clear evidence to show that the infiltrators this time are regulars, irregulars and mercenaries despatched by the Pakistani army, and not Kashmiri "freedom fighters" as claimed by Pakistan.

"The territory of a State shall not be the object of military occupation", or "the object of acquisition", resulting from unlawful threat or use of force by another state, proclaims the Friendly Relations Declaration. "No territorial acquisition resulting from the threat or use of force shall be regarded as legal", evidently because an illegal resort to force can only produce situations that *per se* illegal...(Article 5(3) of the 1974 Declaration on Definition of Aggression reaffirms this principle).

### C. The Right of Self-Defence

The principle of prohibition of force recognizes one exception — the right of self-defence. Article 51 of the UN Charter speaks of "the inherent right [of every state] of individual or collective self-defence if an armed attack occurs" against it.. (The French version of the Charter speaks of '*aggression armee*']. The right of self-defence is

fundamentally conditioned by the customary international law princi of necessity (of warding off of the attack), and of proportionality ( force to be used in self-defence not to be out of proportion with danger to be warded off), besides respect for the principles international humanitarian law applicable in armed conflict.

What then constitutes an "armed attack'? As the International Co of Justice held in the *Nicaragua* case,[5] "an armed attack must understood as including not merely action by regular armed forces acr an international border, but also 'the sending by or on behalf of a St of armed bands, groups, irregulars or mercenaries, which carry acts of armed force of such gravity as to amount to "(*inter alia*) actual armed attack conducted by regular forces "or its substant "involvement therein".[6] The Court thus gave its judicial *imprimatur* Article 3(g) of the Declaration on the Definition of Aggression. It furth ruled that "in customary [international] law, the prohibition of arm attacks may apply to the sending by a State of armed bands to t territory of another State, if such an operation, because of its scale a effects, would have been classified as an armed attack rather than mere frontier incident had it been carried out by regular armed forces."

The Declaration on Definition of Aggression also includes in th definition of aggression: (a) "The invasion or attack by the armed forc of a State of the territory of another State, or any military occupatio however temporary, resulting from such invasion or attack", (b) "us of any weapon by a State against the territory of another State", an (c) "an attack by the armed forces of a State on the land, sea, or a forces, ... of another State." (Article 3, (a), (b), & (d)).

In view of the above, the acts of unlawful use of force by Pakista against and on the Indian territory amount to acts of such sufficie gravity as to constitute "armed attacks" and India is well within i "inherent right of self-defence" to take the necessary forcible measur to push out the Pakistani infiltrators and the accompanying mercenarie These defensive measures include aerial bombardment of the pos occupied by these intruders on the Indian side of the LoC and measur to cut off their supply lines originating from Pakistani bases along close to the LoC. Yet by and large, India seems to have confined i defensive actions to its own side of the LoC. It will, however, be withi its right of self-defence, if it decides to go across the line to destroy th supply bases that sustain the infiltrators on the Indian side of the lin

5. *ICJ Reports 1986*, paras 187-201, p. 103.
6. *Ibid.*
7. *Id.*

The right of self-defence extends to the complete routing out of the present danger, even keeping in mind the principle of proportionality. This will, of course, depend on a military judgment backed by a political decision, which will obviously be dictated by diverse domestic and external considerations.

### D. Dispatch of Mercenaries into Indian Territory

Ever since the Dogs of War controversy in Angola in the 70's, the international law relating to mercenaries has vastly changed. The International Convention against the Recruitment, Use, Financing and Training of Mercenaries adopted by the UN General Assembly in 1989,[8] substantive provisions of which have since become part of general international law, interdicts states from recruiting, using, financing or training mercenaries. Both the mercenary and his employer state bear criminal responsibility under international law. States have duties with respect to extradition or prosecution of mercenaries. All these are in addition to the fundamental duty of a state to ensure that its territory is not being used to the detriment of another state.

In the case of Pakistan, its involvement with the recruitment, training, financing and use of mercenaries across the LoC and the international border into the Indian territories has been a decade old. The fall of the Soviet-backed Afghan government only further augmented it, with the increased availability of mercenaries now released from duty in Afghanistan, along with a surfeit of light but sophisticated weapons orignially supplied by the United States. According to one estimate, over 80% of the American supplied military hardware originally for use in Afghanistan, came to be deployed in the Pakistan-backed cross-border terrorist activities against India. The Kargil situation has further revealed the nexus between the Pakistani army and the Afghan mercenaries now used in large numbers, often wielding weapons like the Stinger missiles and using them against Indian targets, that too operating from within the Indian territory. Pakistan has tried to dismiss the Indian complaint, by describing the mercenaries, nay the whole lot of intruders, as "freedom fighters". For the first time since the beginning of the Pakistan-engineered cross border terrorism in Kashmir, the evidence of overt Pakistani involvement in the recruitment, training, financing and deliberate use of mercenaries across the LoC on the Indian territory is overwhelming and the international community has refused to accept the Pakistani explanation. Pakistan bears both delictual and criminal responsibility in respect of employment of mercenaries against

8. For complete text, see *ILM*, vol. 29, no. 1 (1990), pp 89-97.

India. The Pakistani government has an obligation to bring to book only the mercenaries but the high functionaries of the state (includ the Army) who perpetrated the crime of use of mercenaries against Inc

### E. Violations of International Humanitarian Law

The Kargil conflict has brought to fore a number of violations international humanitarian law applicable in armed conflict by t Pakistani army, its irregulars and the mercenaries under its comma and control. The inhuman torture, mutilation including disfigureme and removal of vital parts of the body, and killing of Indian prisone of war by the Pakistani army and its mercenaries has shocked the pub conscience. With the direct involvement of Pakistani army in t hostilities in the Kargil conflict, the 1949 Geneva Conventions international humanitarian law readily apply to the conflict. Und Article 13 of the Convention for the Protection of the PoWs, the PoV are entitled to humane treatment. Further, "Any unlawful act or omissio by the Detaining Power causing death or seriously endangering th health" of a PoW in its custody is prohibited. "In particular, no prison of war may be subjected to physical mutilation..." Even assuming th there is some doubt about the nature of the armed conflict (an assumptio not sustained by the facts of the situation), the minimum guarantees humane treatment of PoWs, the sick and the wounded in action, and th civilian population, under the common Article 3 of all the fou conventions apply. Indeed, as the ICJ declared in the *Nicaragua* case these guarantees are part of general international law and do not depen on the character of the conflict (whether it is of international or no international character). Article 3(1) prohibits "violence to life an person, in particular murder of all kinds, mutilation, cruel treatme and torture" (clause (a)), as well as "outrage upon personal dignity, i particular, humiliating and degrading treatment" (clause (c)).

Pakistan has by all accounts violated these tenets of civilize behaviour, and committed grave breaches the international humanitaria law. It has the duty to proceed against the persons responsible for th commission of these offences—see, e.g., Article 129 of the Conventio for the Protection of the PoWs. These are war crimes for which there both individual and collective responsibility. Nor has India come clea It has not given any account of the sick and the wounded, or othe persons taken prisoner during the Operation Vijay. The militar spokesmen have only reeled out the number of infiltrators killed in th conflict. It is impossible to believe that the Indian armed forces ju

9. See note 5, p. 114.

went on a killing spree!

Pakistan did make an allegation that the Indian armed forces have used chemical weapons during the conflict. However, the international community is yet to be presented with any convincing evidence to substantiate this charge.

In terms of international criminal law, aggression, and grave violations of international humanitarian law constitute international crimes for which both the state and the individuals committing them are criminally responsible.

### F. The Role of ICRC

The Kargil conflict also raises questions on the role of the international organization, particularly, that of the ICRC. The ICRC is essentially an NGO performing commendable humanitarian work in conflict situations the world over. Under the 1949 Geneva Conventions. ICRC performs two levels of humanitarian functions. One, it engages in "humanitarian activities", including, subject to the consent of the parties to the conflict, those for the amelioration of the sick and the wounded and the protection of the PoWs (Article 9 of the first three conventions, and Article 10 of the fourth convention). Two, it offers its services to assume the humanitarian functions performed by the Protecting Power, if such an offer is accepted by the Detaining Power, or it may perform theses functions, should it be requested to do so by the Detaining Power. (Article 10 of the first three conventions, and Article 11 of the fourth convention).

In fact, it was open to either or both the parties to the Kargil conflict to seek the services of the ICRC, particularly for the protection of the sick and the wounded, and the PoWs. The ICRC's interposition would have given greater credence to India's claims. On the other hand, both the parties to the conflict sought to exploit the international standing of the organization by seeking its involvement in certain specific events, to derive some political mileage from it. ICRC's good offices for the handing over of Nachiketa, an Indian PoW, were sought by Pakistan, when it failed to deliver him to the Indian authorities in full publicity on the eve of its Foreign Minister's visit to New Delhi. On the other hand, according to some media reports, India had sought ICRC's presence at the post mortem operations of the mutilated bodies of six Indian soldiers handed over by the Pakistani army. However, the ICRC has denied that it was "officially" contacted by India for the purpose. Instead of following an eclectic approach, India should have authorized the ICRC to perform humanitarian activities of a Protecting Power within

the zone of conflict, if it could in the recent past allow some ICRC in respect of its anti-terrorist operations in Jammu and Kashmir.

The ICRC, on its part, allowed itself to be used by Pakistan in handing over of Nachiketa, whereas it might have thought tha impartiality would be tainted if it lent its presence at the autopsie the mutilated bodies. It thus left itself open to blame as partial to Pakis The facts established by the autopsies were based on medical and fore sciences, which are by and large precise and verifiable. The prese of ICRC would have ensured that the scientific conclusions reache a result of the autopsies are not biased, and that proper procedures w followed for and during the autopsies.

India's hesitation to approach the United nations seeking a resolut of the Kargil conflict is understandable for a number of plausible reaso including in particular the past record of the UN in *suppressio veri suggestio falsi* in relation to Kashmir. However, India failed to en the credentials of ICRC in the international projection and vindicati of its stand on the conflict.

## NOTES AND COMMENTS

# HAZARDOUS WASTE: A LEGAL PERSPECTIVE

SANJAY PARIKH*

We have become conscious of the fact of dumping of hazardous waste in our country not long back. Though the Basel Convention[1] was in existence, having been ratified by India, not many people (including environmentalists) were aware of it, its implications and obligations flowing from it. And there were no protests against the continuing acts of the industrialised nations dumping their wastes (more than 90% of the total waste in the world) due to stricter environmental laws in their countries, higher cost at recycling, people's opposition and the difficulty faced in locating final disposal sites. India was therefore discovered as a convenient place for dumping, with no resistance either from the authorities or from the people. The implementing authorities (Central Pollution Control Board and State Pollution Control Boards)[2] were totally ignorant about the menace of dumping of hazardous waste. It is a shocking fact that none of the industries re-cycling hazardous waste had any facility for safe disposal of such waste in an environmentally sound manner. The practice which was followed, in callous disregard to the law and environment, was to dump the hazardous waste in the manner the industries chose. There was no control whatsoever. To what extent the Pollution Control Boards have now succeeded in controlling it is a detailed chapter; its history begins with initiation of a Public Interest Litigation (PIL)[3] in the Supreme of India. Whatever criticism

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1. Basel Convention on the Control of Transboundary Movements of Hazardous wastes and their Disposal, 1989, see *International Legal Materials*, vol. 28 (1989), pp.657-686, also, Najmul Arif; *International Environmental Law : Basic Documents and Self References* (New Delhi, 1996), pp.417-447.
2. Central Pollution Control Board (CPCB) was constituted under Section 3 of the water (Prevention and Control of Pollution) Act, 1974. It has been assigned various duties under water Act, 1974, Air (Prevention & Control of Pollution) Act 1981 and the Environment (Protection) Act, 1986. Section 4 of Water Act provides for separate Pollution Control Boards for the States in India. The composition of State Boards is more or less on the same lines of the Central Board.
3. S.K. Aggarwal, *Public Interest Litigation in India* (New Delhi, 1986); Clark D Cunnigham, "Public Interest Litigation in Indian Supreme Court: A Study in the Light of American Experience", *Journal of the Indian Law Insitute*, vol.30 (1988), pp. 19-44; Jamie Cassels, "Judicial Activism and Public Interest Litigation in India: Attempting the Impossible!", *American Journal of Comparative Law*, vol.37 (1989).

may be made of the PIL, accusing judiciary of exceeding its limits, it is true, and has been admitted by even the Government that it is t PIL which made them aware about the magnitude of the problem a that it may take a serious turn if not checked immediately. The conc of this paper is not to discuss or comment on the litigation which pending before the Supreme Court but to indicate some of the relev aspects as they emanate only through the said litigation.

The Basel Convention which was signed by India on 22 Septemb 1992 sought to regulate the "garbage imperialism" or "toxic terrorism as it was called, indulged in by the Organisation for the Econom Cooperation and Development (OECD) countries towards Non-OEC Countries. The Basel Convention envisaged that in the beginning year 1998, there will be complete ban on exports of hazardous was but it could not materialise for obvious reasons. Besides so ma important clauses in the Basel Convention, the most important one that the country which is importing hazardous waste should ha facilities to dispose of the waste in an environmentally sound manne If any industry does not possess this facility, it has no right to contin its operation. The Basel Convention has to finally come out with th lists of banned wastes, where no import or export would be permitte and also the list where the transactions would be strictly regulated.

Let me point out at this juncture only that the Indian Courts, Suprem Court and the High Courts, have given new dimensions to the chapt on fundamental rights in the Constitution, in particular to Article 21, favour of the people and the environment. Article 21 of our Constitutio says that no person's life can be taken away without procedu established by law. The word "life" was extended to "livelihood" in th *Pavement Dweller's case*[4], and thereafter it was extended to rights prisoners, right to environment free of pollution, right to safe drinkin water, right to shelter, right to privacy, right to health etc. The expansio of Article 21 enthused the public interest groups approaching the Hig Courts and the Supreme Court to seek enforcement of right to hav clean and safe environment against the polluting industries, agains irreversible damage to the environment and inaction/non-action of th

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pp. 495-519; P.N. Bhagwati, "Judicial Activism and Public Interest Litigation India", *Colombia Journal of Transnational Law*, vol.23(1985), pp.561-77; V.S. Ma "Human Righs in India: An Overview" (New Delhi, 1997), Occasional Pape no. 4, pp. 51-54.

4. *Olga Tellis* v. *Municipal Corporation, AIR* 1986 *SC* 180, popularly known "Pavement Dwellers case", in which constitution Bench of the Supreme Court he that "Life" under Article 21 of the constitution includes "livelihood" and "to li with dignity".

vernment. This development has taken place within a decade, in ticular, the last few years have shown the courts' activism at its peak cerning environment. The Supreme Court has made obligations of State to provide safe and clean environment under the Directive nciples also enforceable.

The laws which were initially enacted by the parliament, included Water (Prevention and Control of Pollution) Act 1974 and the Air evention and Control of Pollution) Act, 1981. Under these two Acts, es were framed, Pollution Control Boards were constituted and powers re given to enforce the provisions of these two Acts. On 23 May 86 the Environment (Protection) Act, 1986 was brought into force to ovide for protection and improvement of environment and for matters nnected there with. The Act was brought in view of the commitments de by India at the UN Conference on the Human Environment held Stockholm in June 1972. This Act seeks to protect and improve not ly the environment but to prevent hazards to human beings, other ing creatures, plants and property. It is under this Act that the zardous Wastes (Management and Handling) Rules, 1989 have been amed by notification dated, 28 July 1989. There are only 11 provisions these Rules out of which Rule 5 is about the grant of authorisation r handling hazardous wastes and Rule 11 about the import of hazardous astes, among others, are relevant. Under Rule 5 authorisation can be anted to an industry which is collecting, receiving, transporting, storing d disposing of the wastes, *if these units have facilities to handle zardous wastes safely.* Therefore, the grant of authorisation has to lfil the pre condition of the industry having facility for safe disposal hazardous wastes. But, unfortunately, the State Pollution Control oards were granting (and still granting) authorisations without any e of the industries having any facility for safe disposal as provided in e Rules. Even the permission which is granted for import of hazardous astes, was granted without following the conditions mentioned in Rule , by the State Pollution Control Boards when only the Cenral overnment is empowered to grant such permission. The result was at the hazardous wastes were being dumped in our country by industries ving no facilities for safe disposal of such wastes and also not having y permission from the Central Government under Rule 11. It is difficult assess how much quantity of wastes has come to our country illegally d surreptitiously. We know only the figures which have been collected

Dr. M.G.K. Menon Committee was appointed by the Supreme Court, order dated in W.P. No 657195, *RFSTE* v. *UOI*. The Committee has submitted its report only on hazardous wastes lying at various docks/ports/ICDS. The Committee consists of Scientists and NGO,s headed by Prof. M.G.K. Menon.

by the High Powered Committtee[5] under the chairmanship of Dr
Menon for the year 1996-97 and 1997-98. Most of these haz
wastes has come after the ban imposed by the Delhi High Court
Supreme Court. The quantum of hazardous wastes lying at the
ports/ICDS for the above mentioned period is as follows:-

| Waste Category | Waste Imported in 1996-97 | Waste Importe 1997-98 |
|---|---|---|
| Zinc Ash | 21976 MT | 9740 MT |
| Lead Ash | 5020 MT | 2444 MT |
| Lead Batteries | 32561 MT | 7167 MT |
| Waste Oil | 3517 MT | 7610 MT |
| Nickel Hydroxide | 86 MT | - |
| Total | 62960 MT | 26961 MT |

The quantum of hazardous waste which has come to our coun spite of the ban imposed by the Courts clearly shows that the something which is inherently lacking in the law with regard t regulation and control of hazardous waste and that there i implementation of the existing laws. As already mentioned abov the present case the implementing authorities were totally unawa the hazardous waste being imported into the country, not to speak proper management and disposal in an environmentally safe ma The State, in law, is not only bound to implement the conditions im in the Basel Convention but is also under an obligation to imple the amendments, if any, which are made periodically in this conve This is also made clear by the Supreme Court in one of its direct The State owes independently a duty not only to protect the environ but also to find out such alternatives which are environmental fri and which reduce and gradually take away the threat arising out o effects of toxicity in the environment. The High Powered Comm headed by Dr. Menon is supposed to look into the availability of va environmentally safe alternatives, and to suggest a list of other haza substances which are required to be banned or regulated over and a the list of the Basel Convention. The Supreme Court has rec expanded the "public trust doctrine" holding that State is the trust natural resources which are by nature meant for public use enjoyment. The State is also the trustee and is also under a legal du protect the natural resources. Anybody disturbing the environm balance and thereby causing damage to the ecology has to be liable and should be penalised for the same. It is described as "Po

ys Principle'' vide *Vellore Citizens Welfare Forum* vs. *UOI*[6] and *the lian Council for Environment Legal Action* vs. *UOI*.[7] Those industries ich are responsible for damage to the ecology are liable to pay not ly to the individual sufferers but also to pay for restoring the damage ne to the ecology.

There is another development which has taken place in effective plementation of Article 21 *vis-a-vis* the international law. The question to what extent the provisions of international conventions can be ad into the national laws has been dealt with by the Supreme Court in *oples Union of Civil Liberties (PUCL)* Vs. *UOI & Anr*[8] after referring the judgment of an Australian Court which pointed out that the courts ould not interpret and implement the conventions without such nventions becoming the national laws, held that the "provisions of e covenant which elucidate and come to effectuate the fundamental ghts granted by our Constitution, can certainly be relied upon by courts facets of those fundamental rights and hence, enforceable as such". e provisions of the Basel Convention which gives effect to Article of the Constitution and thereby creates obligations for protection of e environment can certainly be enforced by courts in our country thout waiting even for bringing amendments in the domestic laws. e Courts in our country, namely, the High Courts and the Supreme ourt, which give effect to the fundamental rights under the Constitution, n also pass such directions to give effect to convenants of the Basel onvention which are necessary for the protection of the environment, en if no domestic law is brought by the legislation. The domain of e environmental jurisprudence in our country has therefore expanded fficiently. The only thing which is required is the will of the authorities implement the laws and the people becoming conscious of their rights d duties for the protection of the ecology.

The Hazardous Waste (Management and Handling) Rules, 1989 have be brought in consonance with the Basel Convention; over and above, e Rules have to be framed by keeping in mind the already alarming llution level in our country, plugging the loop-holes which erring dustries take resort to. It has to be ensured that any hazardous waste ich is ultimately permitted for import must contain all the particulars

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5 *SCC* (1996), p. 647.

3 *SCC* (1996), p. 212.

3 *SCC* (1997), p. 433. This case was dealt with fake encounter in state of Manipur. While granting compensation as a part of public law remedy for violation of Article 21, the Supreme Court co. sidered the question of implementation of international conventions, treaties and held that the conventions which effectuate the fundamental rights can be enforced by the Courts.

of various components certified by the exporting country importing country should verify those particulars at the dock There should be laboratory facilities to check whether the info provided on the container and in the certificate are true and co the information is found incorrect then exporting country should under an obligation to take it back and pay the penalty for such wastes. The laboratory facilities should have sophis equipment and experts. The necessary amendments in this regard be done in the Customs Act as well as various other laws deali the import. The industry which has imported such hazardous was have requisite permission and the facility for safe disposal as requisite condition. The lifting of hazardous waste from the dock etc. should be done in a environmentally safe manner. There sh proper record to show that the hazardous waste has reached the i safely and that it was recycled in that industry alone and was no to any other traders outside. A report with regard to each consi should remain with such industry and also with the State as Central Pollution Control Board. Such reports should also be av to the NGOs who have been working in this field. It should be s the authorities that the disposal sites are maintained by the ind properly in accordance with the guidelines set up by the State. of any threat to environment immediate steps should be taken concerned authorities. The concerned NGOs should be provic information with regard to the particulars of each industry, the haz waste which they are receiving, recycling and the waste which is d in the disposal sites. This will permit these NGOs to have a ch pollution level and they will be able to give warning signals Government as well as to the people.

At this hour when the ecology is under severe threat from pollution, our bio-diversity and indigenous knowledge is being p our food security is in peril and our sovereignty is under serious we must resist all attempts which tend to affect the lives of our i.e. to have fresh air to breathe, to have soil free from pollution, t safe drinking water and the flora and fauna; without which the life becomes a meaningless existence.

## JUDICIAL DECISIONS

## INTERNATIONAL COURT OF JUSTICE

### 29 APRIL 1999

### DIFFERENCE RELATING TO IMMUNITY FROM LEGAL PROCESS OF A SPECIAL RAPPORTEUR OF THE COMMISSION OF HUMAN RIGHTS

### ADVISORY OPINION*

*Article 96, paragraph 2, of the Charter and Article 65, paragraph 1, of the Statute—Resolution 89(I) of the General Assembly authorizing the Economic and Social Council to request advisory opinions—Article VIII, Section 30, of the Convention on the Privileges and Immunities of the United Nations—Existence of a "difference" between the United Nations and one of its Members — Opinion "accepted as decisive by the parties"—Advisory nature of the Court's function and particular treaty provisions—"Legal question"—Question arising "within the scope of [the] activity" of the body requesting it.*

*Jurisdiction and discretionary power of the Court to give an opinion—"Absence of compelling reasons" to decline to give such opinion.*

*Question on which the opinion is requested — Divergence of views—Formulation adopted by the Council as the requesting body.*

*Special Rapporteur of the Commission on Human Rights—"Expert on mission"—Applicability of Article VI, Section 22, of the General Convention—Specific circumstances of the case—Question whether words spoken by the Special Rapporteur during an interview were spoken "in the course of the performance of his mission"—Pivotal role of the Secretary-General in the process of determining whether, in the prevailing circumstances, an expert on mission is entitled to the immunity provided for in Section 22(b)—Interview given by Special Rapporteur to International Commercial Litigation—Contact with the media by Special Rapporteurs of the Commission on Human Rights—Reference to Special Rapporteur's capacity in the text of the interview—Position of the Commission itself.*

*Legal obligations of Malaysia in this case—Point in time from which the question must be answered—Authority and responsibility of the Secretary-General to inform the government of a member State of his*

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* : Mimeographed version by the courtesy of the Registry of the ICJ.

*finding on the immunity of an agent—Finding creating a presumpti which can only be set aside by national courts for the most compelli reasons—Obligation on the governmental authorities to convey th finding to the national co urts concerned Immunity from legal process "of every kind" within the meaning Section 22 (b) of the Convention—Preliminary question which must expeditiously decided in* limine litis.

*Holding the Special Rapporteur financially harmless.*

*Obligation of the Malaysian Government to communicate th advisory opinion to the national courts concerned.*

*Claims for any damages incurred as a result of acts of th Organization or its agents—Article VIII, Section 29, of the Genera Convention—Conduct expected of United Nations agents.*

## ADVISORY OPINION

*Present* : *President* SCHWEBEL; *Vice-President* WEERAMANTRY *Judges* ODA, BEDJAOUI, GUILLAUME, RANJEVA HERCZEGH, SHI, FLEISCHHAUER, KOROMA VERSESHCHETIN, HIGGINS, PARRA-ARANGUREN KOOIJMANS, REZEK; *Registrar* VALENCIA-OSPINA.

Concerning the difference relating to immunity from legal proces of a Special Rapporteur of the Commission on Human Rights,

THE COURT

composed as above,

*gives the following Advisory Opinion:*

1. The question on which the Court has been requested to give ar advisory opinion is set forth in decision 1998/97 adopted by the Unitec Nations Economic and Social Council (hereinafter called the "Council" on 5 August 1998. By a letter dated 7 August 1998, filed in the Registry on 10 August 1998, the Secretary-General of the United Nations officially communicated to the Registrar the Council's decision to submi the question to the Court for an advisory opinion, Decision 1998/297 certified copies of the English and French texts of which were enclosec with the letter, reads as follows:

1. E/1998/94.

*"The Economic and Social Council,*

*Having considered* the note by the Secretary-General on the ivileges and immunities of the Special Rapporteur of the Commission Human Rights on the independence of judges and lawyers,[1]

*Considering* that a difference has arisen between the United Nations d the Government of Malaysia, within the meaning of Section 30 of e Convention on the Privileges and Immunities of the United Nations, ith respect to the immunity from legal process of Dato' Param umaraswamy, the Special Rapporteur of the Commission of Human ights on the independence of judges and lawyers,

*Recalling* General Assembly resolution 89(I) of 11 December 1946,

1. *Requests* on a priority basis, pursuant to Article 96, paragraph 2, f the Charter of the United Nations and in accordance with General ssembly resolution 89(I), an advisory opinion from the International ourt of Justice on the legal question of the applicability of Article VI, ection 22, of the Convention on the Privileges and Immunities of the nited Nations in the case of Dato' Param Cumaraswamy as Special apporteur of the Commission on Human Rights on the independence f judges and lawyers, taking into account the circumstances set out in aragraphs 1 to 15 of the note by the Secretary-General[2], and on the gal obligations of Malaysia in this case;

2. *Calls upon* the Government of Malaysia to ensure that all idgments and proceedings in this matter in the Malaysian courts are ayed pending receipt of the advisory opinion of the International Court f Justice, which shall be accepted as decisive by the parties.

lso enclosed with the letter were certified copies of the English in rench texts of the note by the Secretary-General dated 28 July 1998 nd entitled "Privileges and Immunities of the Special Rapporteur of ne Commission on Human Rights on the Independence of Judges and awyers" and of the addendum to that note (E/1998/94/Add. 1), dated August 1998.

2. By letters dated 10 August 1998, the Registrar, pursuant to Article 5, paragraph 1, of the Statute of the Court, gave notice of the request r an advisory opinion to all States entitled to appear before the Court. copy of the bilingual printed version of the request, prepared by the egistry, was subsequently sent to those States.

3. By an Order dated 10 August 1998, the senior judge, acting as resident of the Court under Article 13, paragraph 3, of the Rules of ourt, decided that the United Nations and the States which are parties

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E/1998/94.

to the Convention on the Privileges and Immunities of the United N
adopted by the United Nations General Assembly on 13 February
(hereinafter called the "General Convention") were likely to be a
furnish information on the question in accordance with Artic
paragraph 2, of the Statute. By the same Order, the senior ju
considering that, in fixing time-limits for the proceedings, i
"necessary to bear in mind that the request for an advisory opinio
expressly made 'on a priority basis"', fixed 7 October 1998 as the
limit within which written statements on the question might be sub
to the Court, in accordance with Article 66, paragraph 2, of the St
and 6 November 1998 as the time-limit for written comments on w
statements, in accordance with Article 66, paragraph 4, of the St

On 10 August 1998, the Registrar sent to the United Nations a
the States parties to the General Convention the special and d
communication provided for in Article 66, paragraph 2, of the St

4. By a letter dated 22 September 1998, the Legal Counsel o
United Nations communicated to the President of the Court a cer
copy of the amended French version of the note by the Secretary-Ge
which had been enclosed with the request. Consequently, a corrige
to the printed French version of the request for an advisory opinion
communicated to all States entitled to appear before the Court.

5. The Secretary-General communicated to the Court, pursua
Article 65, paragraph 2, of the Statute, a dossier of documents like
throw light upon the question; these documents were received i
Registry in instalments from 5 October 1998 onwards.

6. Within the time-limit fixed by the Order of 10 August 1998, wr
statements were filed by the Secretary-General of the United Na
and by Costa Rica, Germany, Italy, Malaysia, Sweden, the Ur
Kingdom and the United States of America; the filing of a wr
statement by Greece on 12 October 1998 was authorized. A re
letter was also received from Luxembourg on 29 October 1998. Wr
comments on the statements were submitted, within the prescribed t
limit, by the Secretary-General of the United Nations and by Costa
Malaysia, and the United States of America. Upon receipt of t
statements and comments, the Registrar communicated them to all S
having taken part in the written proceedings.

The Registrar also communicated to those States the text of
introductory note to the dossier of documents submitted by
Secretary-General. In addition, the President of the court gra
Malaysia's request for a copy of the whole dossier; on the instruc
of the President, the Deputy-Registrar also communicated a cop

that dossier to the other States having taken part in the written proceedings, and the Secretary-General was so informed.

7. The Court decided to hold hearings, opening on 7 December 1998, at which oral statements might be submitted to the Court by the United Nations and the States parties to the General Convention.

8. Pursuant to Article 106 of the Rules of Court, the Court decided to make the written statements and comments submitted to the Court accessible to the public, with effect from the opening of the oral proceedings.

9. In the course of public sittings held on 7 and 8 December 1998, the Court heard oral statements in the following order by:

| | |
|---|---|
| *for the United Nations:* | Mr. Hans Corell, Under-Secretary-General for Legal Affairs, The Legal Counsel, |
| | Mr. Ralph Zacklin, Assistant Secretary-General for Legal Affairs; |
| *for Costa Rica:* | H.E. Mr. Jose' de J, Conejo, Ambassador of Costa Rica to the Netherlands, |
| | Mr. Charles N. Brower, White & Case LLP; |
| *for Italy:* | Mr. Umberto Leanza, Head of the Diplomatic Legal Service at the Ministry of Foreign Affairs; |
| *for Malaysia:* | Dato' Heliliah bt Mohd Yusof, Solicitor General of Malaysia, |
| | Sir Elihu Lauterpacht, C.B.E., Q.C., Honorary Professor of International Law, University of Cambridge. |

The Court having decided to authorize a second round of oral statements, the United Nations, Costa Rica and Malaysia availed themselves of this option; at a public hearing held on 10 December 1998, Mr. Hans Corell, H.E. Mr. Jose'de J. Conejo, Mr. Charles N. Brower, Dato' Heliliah bt Mohd Yusof and Sir Elihu Lauterpacht were successively heard.

Members of the Court put questions to the Secretary-General's representative, who replied both orally and in writing. Copies of the written replies were communicated to all the States having taken part in the oral proceedings; Malsysia submitted written comments on these replies.

10. In its decision 1998/297, the Council asked the Court to take into account, for purposes of the advisory opinion requested, the

"circumstances set out in paragraphs 1 to 15 of the note by the Secretary General" (E/198/94). Those paragraphs read as follows:

"1. In its resolution 22A(1) of 13 February 1946, the General Assembly adopted, pursuant to Article 105(3) of the Charter of the United Nations, the Convention on the Privileges and Immunities of the United Nations (the Convention). Since then 137 Member States have become parties to the Convention, and its provisions have been incorporated by reference into many hundreds of agreements relating to the headquarters or seats of the United Nations and its organs, and to activities carried out by the Organization in nearly every country of the world.

2. That Convention is, *inter alia,* designed to protect various categories of persons, including 'Experts on Mission for the United Nations', from all types of interference by national authorities. In particular, Section 22(*b*) of Article VI of the Convention provides:

   *Section 22*: Experts (other than officials coming within the scope of Article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including time spend on journeys in connection with their missions. In particular they shall be accorded:

(*b*) in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of any kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations.

3. In its Advisory Opinion of 14 December 1989, on the *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* (the so-called '*Mazilu* case'), the International Court of Justice held that a Special Rapporteur of the subcommission on the Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights was an 'expert on mission' within the meaning of Article VI of the Convention.

4. The Commission on Human Rights, by its resolution 1994/41 of 4 March 1994, endorsed by the Economic and Social Council in its decision 194/251 of 22 July 194, appointed Dato' Param

Cumaraswamy, a Malaysian jurist, as the Commission's Special Rapporteur on the Independence of Judges and Lawyers. His mandate consists of tasks including, *inter alia*, to inquire into substantial allegations concerning, and to identify and record attacks on, the independence of the judiciary, lawyers and court officials. Mr. Cumaraswamy has submitted four reports to the Commission on the Execution of his mandate: E/CN.4/1995/39, E/CN.4/1996/37, E/CN.4/1997/32 and E/CN.4/1998/39. After the third report containing a section on the litigation pending against him in the Malaysian civil courts, the Commission at its fifty-fourth session, in April 1997, renewed his mandate for an additional three years.

5. In November 1995 the Special Rapporteur gave an interview to *International Commercial Litigation*, a magazine published in the United Kingdom of Great Britain and Northern Ireland but circulated also in Malaysia, in which he commented on certain litigations that had been carried out in Malaysian courts. As a result of an article published on the basis of that interview, two commercial companies in Malaysia asserted that the said article contained defamatory words that had 'brought them into public scandal, odium and contempt'. Each company field a suit against him for damages amounting to M$30 million (approximately US$12 million each), "including exemplary damages for slander'.

6. Acting on behalf of the Secretary-General, the Legal Counsel considered the circumstances of the interview and of the controverted passages of the article and determined that Dato' Param Cumaraswamy was interviewed in his official capacity as Special Rapporteur on the Independence of Judges and Lawyers, that the article clearly referred to his United Nations capacity and to the Special Rapporteur's United Nations global mandate to investigate allegations concerning the independence of the judiciary and that the quoted passages related to such allegations. On 15 January 1997, the Legal Counsel, in a note verbale addressed to the Permanent Representative of Malaysia to the United Nations, therefore 'requested the competent Malaysian authorities to promptly advise the Malaysian courts of the Special Rapporteur's immunity from legal process' with respect to that particular complaint. On 20 January 1997, the Special Rapporteur filed an application in the High Court of Kuala Lampur (the trial court in which the said suit had been filed) to set aside and/or strike out the plaintiffs' writ, on the ground that the words that were the subject of the suits had been spoken by him in the

course of performing his mission for the United Nations a Special Rapporteur on the Independence of Judges and Lawyer The Secretary-General issued a note on 7 March 1997 confirmin that 'the words which constitute the basis of plaintiffs' complai in this case were spoken by the Special Rapporteur in the cours of his mission' and that the Secretary-General 'therefor maintains that Dato' Param Cumaraswamy is immune from lega process with respect thereto'. The Special Rapporteur filed thi note in support of his above-mentioned application.

7. After a draft of a certificate that the Minister for Foreign Affair proposed to file with the trial court had been discussed wit representatives of the Office of Legal Affairs, who had indicate that the draft set out the immunities of the Special Rapporteu incompletely and inadequately, the Minister nevertheless on 1 March 1997 filed the certificate in the form originally proposed in particular the final sentence of that certificate in effect invite the trial court to determine at its own discretion whether the immunity applied, by stating that this was the case '*only* in respec of words spoken or written and acts done by him in the course of the performance of his mission' (emphasis added). In spite o the representations that had been made by the Office of Lega Affairs, the certificate failed to refer in any way to the note tha the Secretary-General had issued a few days earlier and that had in the meantime been filed with the court, nor did it indicate tha in this respect, i.e. in deciding whether particular words or acts of an expert fell within the scope of his mission, the determination could exclusively be made by the Secretary-General, and that such determination had conclusive effect and therefore had to be accepted as such by the court. In spite of repeated requests by the Legal Counsel, the Minister for Foreign Affairs refused to amend his certificate or to supplement it in the manner urged by the United Nations.

8. On 28 June 1997, the competent judge of the Malaysian High Court for Kuala Lumpur concluded that she was 'unable to hold that the Defendant is absolutely protected by the immunity he claims', in part because she considered that the Secretary-General's note was merely 'an opinion' with scan probative value and no binding force upon the court and that the Minister for Foreign Affairs' certificate 'would appear to be no more than a bland statement as to a state of fact pertaining to the Defendant's status and mandate as a Special Rapporteur and appears to have room for interpretation'. The Court ordered that the Special

Rapporteur and appears to have room for interpretation'. The Court ordered that the Special rapporteur's motion be dismissed with costs, that costs be taxed and paid forthwith by him and that he file and serve his defence within 14 days. On 8 July, the Court of Appeal dismissed Mr. Cumaraswamy's motion for a stay of execution.

9. On 30 June and 7 July 1997, the Legal Counsel thereupon sent notes verbales to the Permanent Representative of Malaysia, and also held meetings with him and his Deputy. In the latter note, the Legal Counsel, *inter alia*, called on the Malaysian Government to intervene in the current proceedings so that the burden of any further defence, including any expenses and taxed costs resulting therefrom, be assumed by the Government; to hold Mr. Cumaraswamy harmless in respect of the expenses he had already incurred or that were being taxed to him in respect of the proceedings so far; and, so as to prevent the accumulation of additional expenses and costs and the further need to submit a defence until the matter of his immunity was definitively resolved between the United Nations and the Government, to support a motion to have the High Court proceedings stayed until such resolution. The Legal Counsel referred to the provisions for the settlement of differences arising out of the interpretation and application of the 1946 Convention that might arise between the Organization and a Member State, which are set out in Section 30 of the Convention, and indicated that if the Government decided that it cannot or does not wish to protect and to hold harmless the Special Rapporteur in the indicated manner, a difference within the meaning of those provisions might be considered to have arisen between the Organization and the Government of Malaysia.

10. Section 30 of the Convention provides as follows:

> *Section 30:* All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties.

11. On 10 July yet another lawsuit was filed against the S Rapporteur by one of the lawyers mentioned in the ma article referred to in paragraph 5 above, based on precise same passages of the interview and claiming damages amount of M$60 million (US$24 million). On 11 Jul Secretary-General issued a note corresponding to the one March 1997 (see para. 6 above) and also communicated verbale with essentially the same test to the Perm Representative of Malaysia with the request that it be pres formally to the competent Malaysian court by the Govern

12. On 23 October and 21 November 1997, new plaintiffs fi third and fourth lawsuit against the Special Rapporteur for M millions (US$40 million) and M$60 million (US$24 mi respectively. On 27 October and 22 November 1997 Secretary-General issued identical certificates of the Sp Rapporteur's immunity.

13. On 7 November 1997, the Secretary-General advised the F Minister of Malaysia that a difference might have arisen bet the United Nations and the Government of Malaysia and the possibility of resorting to the International Court of Ju pursuant to Section 30 of the Convention. Nonetheless o February 1998, the Federal Court of Malaysia denied Cumaraswamy's application for leave to appeal stating th is neither a sovereign nor a full-fledged diplomat but merel unpaid, part-time provider of information'.

14. The Secretary-General then appointed a Special Envory, M Yves Fortier of Canada, who, on 26 and 27 February 1 undertook an official visit to Kaula Lumpur to reac agreement with the Government of Malaysia on a submission to the International Court of Justice. Following visit, on 13 March 1998 the Minister for Foreign Affai Malaysia informed the Secretary-General's Special Envoy o Government's desire to reach an out-of-court settlement. I effort to reach such a settlement, the Office of Legal Af proposed the terms of such a settlement on 23 March 1998 a draft settlement agreement on 26 May 1998. Althoug Government of Malaysia succeeded in staying proceedin the four lawsuits until September 1998, no final settle agreement was concluded. During this period, the Govern of Malaysia insisted that, in order to negotiate a settlement, M Fortier must return to Kuala Lumpur. While Maître Fo preferred to undertake the trip only once a preliminary agree

between the parties had been reached, nonetheless, based on the Prime Minister of Malaysia's request that Maitre Fortier return as soon as possible, the Secretary-General requested his Special Envoy to do so.

15. Maître Fortier undertook a second official visit to Kuala Lumpur, from 25 to 28 July 1998, during which he concluded that the Government of Malaysia was not going to participate either in settling this matter or in preparing a joint submission to the current session of the Economic and Social Council. The Secretary-General's Special Envoy therefore advised that the matter should be referred to the Council to request an advisory opinion from the International Court of Justice. The United Nations had exhausted all efforts to reach either a negotiated settlement or a joint submission through the Council to the International Court of Justice. In this connection, the Government of Malaysia has acknowledged the Organization's right to refer the matter to the Council to request an advisory opinion in accordance with Section 30 of the Convention, advised the Secretary-General's Special Envoy that the United Nations should proceed to do so, and indicated that, while it will make its own presentations to the International Court of Justice, it does not oppose the submission of the matter to the Court through the Council."

11. The dossier of documents submitted to the Court by the Secretary-General (see paragraph 5 above) contains the following additional information that bears on an understanding of the request to the Court.

12. The article published in the November 1995 issue of *International Commercial Litigation*, which is referred to in paragraph 5 of the foregoing note by the Secretary-General, was written by David Samuels and entitled "Malaysian Justice of Trial". The article gave a critical appraisal of the Malaysian judicial system in relation to a number of court decisions. Various Malaysian lawyers were interviewed; as quoted in the article, they expressed their concern that, as a result of these decisions, foreign investors and manufacturers might lose the confidence they had always had in the integrity of the Malaysian judicial system.

13. It was in this context that Mr. Cumaraswamy, who was referred to in the article more than once in his capacity as the United Nations Special Rapporteur on the Independence of Judges and Lawyers, was asked to give his comments. With regard to a specific case (the *Ayer Molek* case), he said that it looked like "a very obvious, perhaps even glaring example of judge-choosing", although he stressed that he had

not finished his investigation.

Mr. Cumaraswamy is also quoted as having said:

> "Complains are rife that certain highly placed personalities in the business and corporate sectors are able to manipulate the Malaysian system of justice".

He added: "But I do not want any of the people involved to think I h made up my mind." He also said:

> "It would be unfair to name any names, but there is some concern about this among foreign businessmen based in Malaysia, particularly those who have litigation pending."

14. On 18 December 1995, two commercial firms and their le counsel addressed letters to Mr. Cumaraswamy in which they maintai that they were defamed by Mr. Cumaraswamy's statements in the artic since it was clear, they claimed, that they were being accused corruption in the *Ayer Molek* case. They informed Mr. Cumaraswa that they had "no choice but to issue defamation proceedings agai him" and added

> "It is important that all steps are taken for the purpose of mitigating the continuing damage being done to [our] business and commercial reputations which is worldwide, as quickly and effectively as possible."

15. On 28 December 1995, in view of the foregoing letters, t Secretariat of the United Nations issued a Note Verbale to the Permane Mission of Malaysia in Geneva, requesting that the competent Malaysi authorities be advised, and that they in turn advise the Malaysian cou of the Special Rapporteur's immunity from legal process. This was t first in a series of similar communications, containing the same findi sent by or on behalf of the Secretary-General—some of the which a sent once court proceedings had been initiated (see paragraphs 6 *seq.* of the note by the Secretary-General, reproduced in paragraph above).

16. On 12 December 1996, the two commercial firms issued a w of summons and statement of claim against Mr. Cumaraswamy in t High Court of Kuala Lumpur. They claimed damages includi exemplary damages, for slander and libel, and requested an injuncti tc restrain Mr. Cumaraswamy from further defaming the plaintiffs.

17. As stated in the note of the Secretary-General, quoted in [p]aragraph 10 above, three further lawsuits flowing from Mr. [C]umaraswamy's statements to *International Commercial Litigation* were [b]rought against him.

The Government of Malaysia did not transmit to its courts the texts [c]ontaining the Secretary-General's finding that Mr. Cumaraswamy was [e]ntitled to immunity from legal process.

The High Court of Kuala Lumpur did not pass upon Mr. [C]umaraswamy's immunity *in limine litis*, but held that it had jurisdiction [t]o hear the case before it on the merits, including making a determination [o]f whether Mr. Cumaraswamy was entitled to any immunity. This [d]ecision was upheld by both the Court of Appeal and the Federal Court [o]f Malaysia.

18. As indicated in paragraph 4 of the above note by the Secretary-[G]eneral, the Special Rapporteur made regular reports to the Commission [o]n Human Rights (hereinafter called the "Commission").

In his first report (E/CN.4/1995/39), dated 6 February 1995, Mr. [C]umaraswamy did not refer to contacts with the media. In resolution [1]995/36 of 3 March 1995, the Commission welcomed this report and [t]ook note of the methods of work described therein in paragraphs 63 to [9]3.

In his second report (E/CN.4/1996/37), dated 1 March 996, the [S]pecial Rapporteur referred to the *Ayer Molek* case and to a critical [p]ress statement made by the Bar Council of Malaysia on 21 August [1]995. The report also included the following quotation from a press [s]tatement issued by Mr. Cumaraswamy on 23 August 1995:

> "Complaints are rife that certain highly placed personalities in Malaysia including those in business and corporate sectors are manipulating the Malaysian system of justice and thereby undermining the due administration of independent and impartial justice by the courts.
>
> Under the mandate entrusted to me by the United Nations Commission on Human Rights, I am duty bound to investigate these complaints and report to the same Commission, if possible at its fifty-second session next year. To facilitate my inquiries I will seek the cooperation of all those involved in the administration of justice, including the Government which, under my mandate, is requested to extend its cooperation and assistance."

In resolution 1996/34 of 19 April 1996, the Commission took no this report and of the Special Rapporteur's working methods.

In his third report (E/CN.4/1997/32), dated 18 February 1997 Special Rapporteur informed the commission of the articl *International Commercial Litigation* and the lawsuits that had initiated against him, the author, the publisher, and others. He referred to the notifications of the Legal Counsel of the United Na to the Malaysian authorities. In resolution 1997/23 of 11 April 1 the Commission took note of the report and the working methods o Special Rapporteur, and extended his mandate for another three y

In his fourth report (E/CN.4/1998/39), dated 12 February 1998, Special Rapporteur reported on further developments with regar the lawsuits initiated against him. In its resolution 1998/35 of 17 A 1998, the Commission similarly took note of this report and of working methods reflected therein.

19. As indicated above (see paragraph 1), the note by the Secret General was accompanied by an addendum (E/1998/94/Add.1) w reads as follows:

> "In paragraph 14 of the note by the Secretary-General on the privileges and immunities of the Special Rapporteur of the Commission of Human Rights on the independence of judges and lawyers (E/1998/94), it is reported that the 'Government of Malaysia succeeded in staying proceedings in the four lawsuits until September 1998'. In this connection, the Secretary-General has been informed that on 1 August 1998, Dato' Param Cumaraswamy was served with a Notice of Taxation and Bill of Costs dated 28 July 1998 and signed by the Deputy Registrar of the Federal Court notifying him that the bill of costs of the Federal Court application would be assessed on 18 September 1998. The amount claimed is M$310,000 (US$77,500). On the same day, Dato' Param Cumaraswamy was also served with a Notice dated 29 July 1998 and signed by the Registrar of the Court of Appeal notifying him that the plaintiff's bill of costs would be assessed on 4 September 1998. The amount claimed in the bill is M$550,000 (US$137,500)."

20. The Council considered the note by the Secretary-General 1998/94) at the forty-seventh and forty-eighth meetings of its substan session of 1998, held on 31 July 1998. At that time the Observer Malaysia disputed certain statements in paragraphs 7, 14 and 15 of note. The note concluded with a paragraph 21 containing the Secret

ieneral's proposal for two questions to be submitted to the Court for n advisory opinion:

> "21....
>
> 'Considering the difference that arisen between the United Nations and the Government of Malaysia with respect to the immunity from legal process of Mr. Dato' Param Cumaraswamy, the United Nations Special Rapporteur of the commission on Human Rights on the Independence of Judges and Lawyers, in respect of certain words spoken by him:
>
> 1. Subject only to Section 30 of the Convention on the Privileges and Immunities of the United Nations, does the Secretary-General of the United Nations have the exclusive authority to determine whether words were spoken in the course of the performance of a mission for the United Nations within the meaning of Section 22(*b*) of the Convention?
>
> 2. In accordance with Section 34 of the Convention, once the Secretary-General has determined that such words were spoken in the course of the performance of a mission and has decided to maintain, or not to waive, the immunity from legal process, does the Government of a Member State party to the Convention have an obligation to give effect to that immunity in its national courts and, if failing to do so, to assume responsibility for, and any costs, expenses and damages arising from, any legal proceedings brought in respect of such words?

On 5 August 1998, at its forty-ninth meeting, the Council considered and adopted without a vote a draft decision submitted by its Vice-President following informal consultations, After referring to Section 30 of the General Convention, the decision requested the Court to give an advisory opinion on the question formulated therein, and called upon the Government of Malaysia to ensure that

> "all judgments and proceedings in this matter in the Malaysian courts are stayed pending receipt of the advisory opinion of the ... Court ...., which shall be accepted as decisive by the parties" (E/1998/L.49/Rev. 1).

At that meeting, the Observer for Malaysia reiterated his previous criticism of paragraphs 7, 14 and 15 of the Secretary-General's note, but made no comment on the terms of the question to be put to the Court as now formulated by the Council. On being so adopted, the draft

became decision 1998/297 (see paragraph 1 above).

21. As regards events subsequent to the submission of reque an advisory opinion, and more precisely, the situation with reg the proceedings pending before the Malaysian courts, Malaysi provided the Court with the following information:

> "the hearings on the question of stay in respect of three of t four cases have been deferred until 9 February 1999 when the are due again to be mentioned in court, and when the plainti will join in requesting further postponements until this Court advisory opinion has been rendered, and sufficient time has bee given to all concerned to consider its implications.
>
> The position in the first of the four cases is the same, although is fixed for mention on 16 December [1998]. However, it wi then be treated in the same way as the other cases. As to cos the requirement for the payment of costs by the defendant ha also been stayed, and that aspect of the case will be deferre and considered in the same way."

22. The Council has requested the present advisory opinion pur to Article 96, paragraph 2, of the Charter of the United Nations. paragraph provides that organs of the United Nations, other thar General Assembly or the Security Council,

> "which may at any time be so authorized by the Genera Assembly, may also request advisory opinions of the Court o legal questions arising within the scope of their activities".

Article 65, paragraph 1, of the Statute of the Court states that

> "[t]he Court may give an advisory opinion on any legal questio at the request of whatever body may be authorized by or i accordance with the Charter of the United Nations to make suc a request".

23. In its decision 198/297, the Council recalls that General Asse resolution 89(I) gave it authorization to request advisory opinions, it expressly makes references to the fact

> "that a difference has arisen between the United Nations and th Government of Malaysia, within the meaning of Section 30 o the Convention on the Privileges and Immunities of the Unite Nations, with respect to the immunity from legal process of Dato Param Cumaraswamy, the Special Rapporteur of the Commissio on Human Rights on the independence of judges and lawyers"

24. This is the first time that the Court has received a request for an advisory opinion that refers to Article VIII, Section 30, of the General Convention, which provides that

> "all differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Courts shall be accepted as decisive by the parties."

25. This section provides for the exercise of the Court's advisory function in the event of a difference between the United Nations and one of its members. In this case, such a difference exists, but the fact does not change the advisory nature of the Court's function, which is governed by the terms of the Charter and of the Statute. As the Court stated in its Advisory Opinion of 12 July 1973,

> "[t]he existence, in the background, of a dispute the parties to which may be affected as a consequence of the Court's opinion, does not change the advisory nature of the Court's task, which is to answer the questions put to it..." (*Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Report 1973,* p. 171, para. 14).

Paragraph 2 of the Council's decision requesting the advisory opinion repeats *expressis verbis* the provision in Article VIII, Section 30, of the General Convention that the Court's opinion "shall be accepted as decisive by the parties". However, this equally cannot affect the nature of the function carried out by the Court when giving its advisory opinion. As the Court said in its Advisory Opinion of 23 October 1956, in a case involving similar language in Article XII of the Statute of the Administrative Tribunal of the International Labour Organisation, such "decisive" or "binding" effect

> "goes beyond the scope attributed by the Charter and by the Statute of the Court to an Advisory Opinion ... It in no wise affects the way in which the Court functions; that continues to be determined by its Statute and its Rules. Nor does it affect the reasoning by which the Court forms its Opinion or the content of the Opinion itself." (*Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO, Advisory Opinion, I.C.J. Report 1956,* p. 84.)

A distinction should thus be drawn between the advisory natu the Court's task and the particular effects that parties to an exis dispute may wish to attribute, in their mutual relations, to an advi opinion of the Court, which, "as such,...has no binding fo (*Interpretation of Peace Treaties with Bulgaria, Hungary and Rom First Phase, Advisory Opinion, I.C.J. Reports 1950,* p. 71). T particular effects, extraneous to the Charter and the Statute w regulate the functioning of the Court, are derived from sepa agreements; in the present case Article VIII, Section 30, of the Ger Convention provides that "[t]he opinion given by the court shal accepted as decisive by the parties". That consequence has b expressly acknowledged by the United Nations and by Malaysia.

26. The power of the Court to give an advisory opinion is der from Article 96, paragraph 2, of the Charter and from Article 65 of Statute (see paragraph 22 above). Both provisions require that question forming the subject-matter of the request should be a "l question". This condition is satisfied in the present case, as all particip in the proceedings have acknowledged, because the advisory opin requested related to the interpretation of the General Convention, to its application to the circumstances of the case of the Spe Rapporteur, Dato' Param Cumaraswamy. Thus the court held in Advisory Opinion of 28 May 1948 that "[t]o determine the meaning a treaty provision ... is a problem of interpretation and consequentl legal question" (*Conditions of Admission of a State to Membershi the United Nations (Article 4 of Charter), Advisory Opinion, 1948, I. Reports 1947-1948,* p. 61).

27. Article 96, paragraph 2, of the Charter also requires that legal questions forming the subject-matter of advisory opini requested by authorized organs of the United Nations and speciali agencies shall arise "within the scope of their activities". The fulfilm of this condition has not been questioned by any of the participant the present proceedings. The Court finds that the legal questi submitted by the Council in its request concern the activities of Commission, since they relate to the mandate of its Special Rapport appointed

> "to inquire into substantial allegations concerning, and to identify and record attacks on, the independence of the judiciary, lawyers and court officials".

Mr. Cumaraswamy's activities as Rapporteur and the legal questi arising therefrom are pertinent to the functioning of the Commissi accordingly they come within the scope of activities of the Coun

since the Commission is one of its subsidiary organs. The same conclusion was reached by the Court in an analogous case, in its Advisory Opinion of 15 December 1989, also given at the request of the Council, regarding the *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations (I.C.J. Report 1989,* p. 18, para 28).

28. As the Court held in its Advisory Opinion of 30 March 1950, the permissive character of Article 65 of the Statute "gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the Request" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 72). Such discretionary power does not exist when the Court is not competent to answer the question". In such a case, "the Court has no discretion in the matter; it must decline to give the opinion requested" *(Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter), Advisory Opinion, I.C.J. Reports 1962, p. 155; cf., Legality of the Use by a State of Nuclear Weapons in Armed conflict, I.C.J. Reports 1996(I),* p. 73, para 14). However, the Court went on to state, in its Advisory Opinion of 20 July 1962, that "even if the question is a legal one, which the Court is undoubtedly competent to answer, it may nonetheless decline to do so" (*I.C.J. Reports 1962,* p. 155).

29. In its Advisory Opinion of 30 March 1950, the Court made it clear that, as an organ of the United Nations, its answer to a request for an advisory opinion "represents its participation in the activities of the Organization, and, in principle, should not be refused" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950,* p. 71); moreover, in its Advisory Opinion of 20 July 1962, citing its Advisory Opinion of 23 October 1956, the Court stressed that "only" compelling reasons' should lead it to refuse to give a requested advisory opinion" (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, p. 155).* (See also, for example, *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989,* pp. 190-191, para 37; and *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996(I),* p. 235, para 14).

30. In the present case, the Court, having established its jurisdiction, finds no compelling reasons not to give the advisory opinion requested

by the Council. Moreover, no participant in these proceedings questi the need for the Court to exercise its advisory function in this cas

31. Article 65, paragraph 2, of the Statute provides that

> "[q]uestions upon which the advisory opinion of the Court i asked shall be laid before the Court by means of a written reques containing an exact statement of the question upon which ar opinion is required".

In compliance with this requirement, the Secretary-General transmi to the Court the text of the Council's decision, paragraph 1 of w reads as follows:

> "1. *Requests* on a priority basis, pursuant to Article 96, paragraph 2, of the Charter of the United Nations and in accordance with General Assembly resolution 89(I), an advisory opinion from the International Court of Justice on the legal question of the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations in the case of Dato' Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers, taking into account the circumstances set out in paragraphs 1 to 15 of note by the Secretary-General, and on the legal obligations of Malaysia in this case.

32. Malaysia has asserted to the Court that it had "at no time appro the text of the question that appeared in E/1998/L.49 or as eventu adopted by ECOSOC and submitted to the Court" and that it "never more than 'take note' of the question as originally formulated by Secretary-General and submitted to the ECOSOC in documents E/19 94". It contends that the advisory opinion of the Court should restricted to the existing difference between the United Nations Malaysia. In Malaysia's view, this difference relates to the question formulated by the Secretary-General himself (see paragraph 20 abov of whether the latter has the exclusive authority to determine whet acts of an expert (including words spoken or written) were perforn in the course of his or her mission. Thus, in the conclusion to the revi version of its written statement, Malaysia states, *inter alia*, that it

> "consider that the Secretary-General of the United Nations has not been vested with the exclusive authority to determine whether words were spoken in the course of the performance of a mission for the United Nations within the meaning of Section 22 (*b*) of the Convention".

In its oral pleadings, Malaysia maintained that

> "in implementing Section 30, ECOSOC is merely a vehicle for placing a difference between the Secretary General and Malaysia before the Court. ECOSOC does not have an independent position to assert as it might have had were it seeking an opinion on some legal question other than is the context of the operation of Article 30. ECOSOC... is no more than an instrument of reference, it cannot change the nature of the difference or alter the content of the question."

33. In the written statement presented on behalf of the Secretary-General, the Legal Counsel of the United Nations requested the Court

> "to establish that, subject to article VIII, Sections 29 and 30 of the Convention, the Secretary-General has exclusive authority to determine whether or not words or acts are spoken, written or done in the course of the performance of a mission for the United Nations and whether such words or acts fall within the scope of the mandate entrusted to a United Nations expert on mission".

In this submission, it has also been argued

> "that such matters cannot be determined by, or adjudicated in, the national courts of the Member States parties to the Convention. The later position is coupled with the Secretary-General's right and duty, in accordance with the terms of Article VI, Section 23, of the Convention, to waive the immunity where, in his opinion, it would impede the course of justice and it can be waived without prejudice to the interests of the United Nations."

34. The other States participating in the present proceedings have expressed varying views on the foregoing issue of the exclusive authority of the Secretary-General.

35. As the Council indicated in the preamble to its decision 1998/297, that decision was adopted by the Council on the basis of the note submitted by the Secretary General on "Privileges and Immunities of the Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers" (see paragraph 1 above). Paragraph 1 of the operative part of the decision refers expressly to paragraphs 1 to 15 of that note but not to paragraph 21, containing the two questions that the Secretary-General proposed submitting to the Court (see paragraph 20 above). The Court would point out that the

wording of the question submitted by the Council is quite different f that proposed by the Secretary-General.

36. Participants in these proceedings have advanced differing vi as to what is the legal question to be answered by the Court. The C observes that it is for the Council — and not for a member State nor the Secretary-General — to formulate the terms of a question that Council wishes to ask.

37. The Council adopted its decision 1998/297 without a vote. Council did not pass upon any proposal that the question to be submi to the Court should include, still less be confined to, the issue of exclusive authority of the Secretary-General to determine whether not acts (including words spoken or written) were performed in course of a mission for the United Nations and whether such words acts fall within the scope of the mandate entrusted to an expert mission for the United Nations. Although the Summary Records of Council do not expressly address the matter, it is clear that the Coun as the organ entitled to put the request to the Court, did not adopt question set forth at the conclusion of the note by the Secretary-Gener but instead formulated its own question in terms which were contested at that time (see paragraph 20 above). Accordingly, the Co will now answer the question as formulated by the Council.

38. The Court will initially examine the first part of the questi laid before the Court by the Council, which is:

> "the legal question of the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the Untied Nations in the case of Dato' Param Cumaraswamy as Special Rapporteur of the Commission of Human Rights on the independence of judges and lawyers, taking into account the circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General..."

39. From the deliberations which took place in the Council on t content of the request for an advisory opinion, it is clear that the referen in the request to the note of the Secretary-General was made in order provide the Court with the basic facts to which to refer in making decision. The request of the Council therefore does not only pertain the threshold question whether Mr. Cumaraswamy was and is an exp on mission in the sense of Article VI, Section 22, of the Gene Convention but, in the event of an affirmative answer to this questio to the consequences of that finding in the circumstances of the case

40. Pursuant to Article 105 of the Charter of the United Nations:

> "1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.
>
> 2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.
>
> 3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose."

Acting in accordance with Article 105 of the Charter, the General Assembly approved the General Convention on 13 February 1946 and proposed it for accession by each Member of the United Nations. Malaysia became a party to the General Convention, without reservation, on 28 October 1957.

41. The General Convention contains an Article VI Entitled "Experts on Missions for the United Nations". It is comprised to two Sections 22 and 23). Section 22 provides:

> "Experts (other than officials coming within the scope of Article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of the their functions during the period of their missions, including time spent on journeys in connection with their missions. In particular they shall be accorded:
>
> (b) in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on mission for the United Nations."

42. In its Advisory Opinion of 14 December 1989 on the Applicability of Article VI, Section 22, *of the Convention on the Privileges and Immunities of the United Nations*, the Court examined the applicability of Section 22 *ratione personae, ratione temporis and ratione loci.*

In this context the Court stated:

> "The purpose of Section 22 is ... evident, namely, to enable the United Nations to entrust missions to persons who do not have the status of an official of the Organization, and to guarantee them 'such privileges and immunities as are necessary for the independent exercise of their functions'... The essence of the matter lies not in their administrative position but in the nature of their mission." (*I.C.J. Reports 1989*, p. 194, para. 47.)

In that same Advisory Opinion, the court concluded that a Spec Rapporteur who is appointed by the Sub-Commission on Prevention Discrimination and Protection of Minorities and is entrusted with research mission must be regarded as an expert on mission within t meaning of Article VI, Section 22, of the General Convention (*ibi* p. 197, para. 55).

43. The Same conclusion must be drawn with regard to Speci Rapporteurs appointed by the Human Rights Commission, of which t Sub-Commission is a subsidiary organ. It may be observed that Speci Rapporteurs of the Commission usually are entrusted not only with research mission but also with the task of monitoring human righ violations and reporting on them. But what is decisive is that they ha been entrusted with a mission by the United Nations and are therefo entitled to the privileges and immunities provided for in Article V Section 22, that safeguard the independent exercise of their function

44. By a letter of 21 April 194, the Chairman of the Commissio informed the Assistant Secretary-General for Human Rights of M Cumaraswamy's appointment as Special Rapporteur. The mandate the Special Rapporteur is contained in resolution 1994/41 of th Commission entitled "Independence and Impartiality of the Judiciar Jurors and Assessors and the Independence of Lawyers". This resolutio was endorsed by the Council in its decision 1994/251 of 22 July 199 The Special Rapporteur's mandate consists of the following tasks:

"(*a*) to inquire into any substantial allegations transmitted to him or her and report his or her conclusions thereon;

(*b*) to identify and record not only attacks on the independence of the judiciary, lawyers and court officials but also progress achieved in protecting and enhancing their independence, and make concrete recommendations, including accommodations for the provision of advisory services or technical assistance when they are requested by the State concerned;

(*c*) to study, for the purpose of making proposals, important and topical questions for principle with a view to protecting and enhancing the independence of the judiciary and lawyers."

45. The Commission extended by resolution 1997/23 of 11 April 997 [Dossier No. 7] the Special Rapporteur's mandate for a further eriod of three years.

In the light of these circumstances, the Court finds that Mr. umaraswamay must be regarded as an expert on mission within the eaning of Article VI, Section 22, as from 21 April 1994, that by virtue f this capacity the provisions of the Section were applicable to him at e time of his statements at issue, and that they continue to be applicable.

46. The Court observes that Malaysia has acknowledged that Mr. umaraswamy, as Special Rapporteur of the Commission, is an expert n mission and that such experts enjoy the privileges and immunities rovided for under the General Convention in their relations with States arties, including those of which they are nationals or on the territory f which they reside. Malaysia and the United Nations are in full greement on these points, as are the other States participating in the roceedings.

47. The Court will now consider whether the immunity provided for n Section 22 *(b)* applies to Mr. Cumaraswamy in the specific ircumstances of the case; namely, whether the words used by him in he interview, as published in the article in *Intentional Commercial itigation* (November issue 1995), were spoken in the course of the erformance of his mission, and whether he was therefore immune from egal process with respect to these words.

48. During the oral proceedings, the Solicitor-General of Malaysia ontended that the issue put by the Council before the Court does not nclude this question. She stated that the correct interpretation of the vords used by the Council in its request

"does not extend to inviting the Court to decide whether, assuming the Secretary-General to have had the authority to determine the charater of the Special Rapporteur's action, he had properly exercised that authority"

nd added:

"Malaysia observes that the word used was 'applicability' not 'application'. 'Applicability' means 'whether the provision is applicable to someone' not 'how it is to be applied'".

49. The Court does not share this interpretation. It follows fro terms of the request that the Council wishes to be informed of the C opinion as to whether Section 22*(b)* is applicable to the Sp Rapporteur, in the circumstances set out in paragraphs 1 to 15 o note of the Secretary-General and whether, therefore, the Secre General's finding that the Special Rapporteur acted in the course o performance of his mission is correct.

50. In the process of determining whether a particular expe mission is entitled, in the prevailing circumstances, to the imm provided for in Section 22(*b*), the Secretary-General of the U Nations has a pivotal role to play. The Sectetary-General, as the administrative officer of the Organization, has the authority an responsibility to exercise the necessary protection where required authority has been recognized by the Court when it stated:

> "Upon examination of the character of the functions entruste to the Organization and of the nature of the missions of its agents it becomes clear that the capacity of the Organization to exercis a measure of functional protection of its agents arises b necessary intendment out of the Charter." (*Reparation fo Injuries Suffered in the Service of the United Nations, Advisor Opinion, I.C.J. Reports 1949,* p. 184.)

51. Article VI, section 23, of the General Convention provides "[p]rivileges and immunities are granted to experts in the interes the United Nations and not for the personal benefit of the indivic themselves." In exercising protection of United Nations experts Secretary-General is therefore protecting the mission with which expert is entrusted. In that respect, the Secretary-General has the pri responsibility and authority to protect the interests of the Organiz and its agents, including experts on mission. As the Court held:

> "In order that the agent may perform his duties satisfactorily, h must feel that this protection is assured to him by th Organization, and that he may count on it. To ensure th independence of the agent, and, consequently, the independen action of the Organization itself, it is essential that in performin his duties he need not have to rely on any other protection tha that of the Organization..." (*Ibid.*, p. 183.)

52. The determination whether an agent of the Organization acted in the course of the performance of his mission depends upo facts of a particular case. In the present case, the Secretary-Genera the Legal Counsel of the United Nations on his behalf, has on nume

ccasions informed the Government of Malaysia of his finding that Mr. umaraswamy had spoken the words quoted in the article in *iternational Commercial Litigation* in his capacity as Special apporteur of the Commission and that he consequently was entitled to nmunity from "every kind" of legal process.

53. As is clear from the written and oral pleadings of the United ations, the Secretary-General was reinforced in this view by the fact hat it has become standard practice of Special Rapporteurs of the ommission to have contact with the media. This practice was confirmed y the High Commissioner for Human Rights who, in a letter dated 2 ctober 1998, included in the dossier, wrote that: "it is more common han not for Special Rapporteurs to speak to the press about matters ertaïning to their investigations, thereby keeping the general public nformed of their work".

54. As noted above (see paragraph 13), Mr. Cumaraswamy was xplicitly referred to several times in the article "Malaysian Justice on rial" in *International Commercial Litigation* in his capacity as United ations Special Repporteur on the Independence of Judges and awyers. In his report to the Commission (see paragraph 18 above), Ir. Cumaraswamy had set out his methods of work, expressed concern bout the independence of the Malaysian judiciary, and referred to the ivil lawsuits initiated against him. His third report noted that the Legal ounsel of the United Nations had informed the Government of Malaysia hat he had spoken in the performance of his mission and was therefore ntitled to immunity from legal process.

55. As noted in paragraph 18 above, in its various resolutions the ommission, took note of the Special Rapporteur's reports and of his iethods of work. In 1997, it extended his mandate for another three ears (see paragraphs 18 and 45 above). The Commission presumably ould not have so acted if it had been of the opinion that Mr. umaraswamy had gone beyond his mandate and had given the iterview to *International Commercial Litigation* outside the course of is functions. Thus the Secretary-General was able to find support for is findings in the Commission's position.

56. The Court is not called upon in the present case to pass upon the ptness of the terms used by the Special Rapporteur or his assessment f the situation. In any event, and in view of all the circumstances of iis case, elements of which are set out in paragraphs 1 to 15 of the ote by the Secretary-General, the Court is of the opinion that the ecretary-General correctly found that Mr. Cumaraswamy, in speaking ie words quoted in the article in *International Commercial Litigation*,

was acting in the course of the performance of his mission as Sp Rapporteur of the Commission. Consequently, Article VI, Section 2 of the Convention is applicable to him in the present case and af Mr. Cumaraswamy immunity from legal process of every kind.

57. The Court will now deal with the second part of the Cour question, namely, "the legal obligations of Malaysia in this case."

58. Malaysia maintains that it is premature to deal with the que of its obligations. It is of the view that the obligation to ensure tha requirements of Section 22 of the Convention are met is an oblig of result and not of means to be employed in achieving that resu further states that Malaysia has complied with its obligation u Section 34 of the General Convention, which provides that a part the Convention must be "in a position under its own to give effe [its] terms", by enacting the necessary legislation; finally it cont that the Malaysian courts have not yet reached a final decision as to Cumaraswamy's entitlement to immunity from legal process.

59. The Court wishes to point out that the request for an advi opinion refers to "the legal obligations of Malaysia in this case". difference which has arisen between the United Nations and Mala originated in the Government of Malaysia not having informed competent Malaysian judicial authorities of the Secretary-Gener finding that Mr. Cumaraswamy had spoken the words at issue in course of the performance of his mission and was, therefore, entitle immunity from legal process (see paragraph 17 above). It is as from time of this omission that the question before the Court must answered.

60. As the Court has observed, the Secretary-General, as the c administrative officer of the Organization, has the primary responsib to safeguard the interest of the Organization; to that end, it is up to to assess whether its agents acted within the scope of their functi and, where he so concludes, to protect these agents, including exp on mission, by asserting their immunity. This means that Secret General has the authority and responsibility to inform the governm of a member State of his finding and, where appropriate, to request i act accordingly and, in particular, to request it to bring his finding the knowledge of the local courts if acts of an agent have given or give rise to court proceedings.

61. When national courts are seised of a case in which the immu of a United Nations agent is in issue, they should immediately be noti of any finding by the Secretary-General concerning that immunity. finding, and its documentary expression, creates a presumption wh

n only be set aside for the most compelling reasons and is thus to be ven the greatest weight by national courts.

The governmental authorities of a party to the General Convention e therefore under an obligation to convey such information to the tional courts concerned, since a proper application of the Convention them is dependent on such information..

Failure to comply with this obligation, among others, could give se to the institution of proceedings under Article VIII, Section 30, of e General Convention.

62. The Court concludes that the Government of Malaysia had an bligation, under Article 105 of the Charter and under the General onvention, to inform its courts of the position taken by the Secretary-eneral. According to a well-established rule of international law, the onduct of any organ of a State must be regarded as an act of the State esponsibility adopted provisionally by the International Law ommission on first reading, which provides:

> "The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinated position in the organization of the State." (*Yearbook of the International Law Commission,* 1973, Vol. II, p. 193.)

Because the Government did not transmit the Secretary-General's nding to the competent courts, and the Minister for Foreign Affairs id not refer to it in his own certificate, Malaysia did not comply with e above-mentioned obligation.

63. Section 22(*b*) of the General Convention explicitly states that xperts on mission shall be accorded immunity from legal process of very kind in respect of words spoken or written and acts done by them the course of the performance of their mission. By necessary nplication, questions of immunity are therefore preliminary issues hich must be expeditiously decided *in limine litis*. This is a generally-ecognized principle of procedural law, and Malaysia was under an bligation to respect it. The Malaysian courts did not rule *in limine litis* n the immunity of the Special Rapporteur (see paragaraph 17 above), ereby nullifying the essence of the immunity rule contained in Section (*b*). Moreover, costs were taxed to Mr. Cumaraswamy while the uestion of immunity was still unresolved. As indicated above, the

conduct of an organ of a State—even an organ independent c executive power—must be regarded as an act of that S Consequently, Malaysia did not act in accordance with its oblig under international law.

64. In addition, the immunity from legal process to which the finds Mr. Cumaraswamy entitled entails holding Mr. Cumarasv financially harmless for any costs imposed upon him by the Mala courts, in particular taxed costs.

65. According to Article VIII, Section 30, of the General Conve the opinion given by the Court shall be accepted as decisive b parties to the dispute. Malaysia has acknowledged its obligations u Section 30.

Since the Court holds that Mr. Cumaraswamy is an expert on mi who under Section 22(*b*) is entitled to immunity from legal process Government of Malaysia is obligated to communicate this advi opinion to the competent Malaysian courts, in order that Malay international obligations be given effect and Mr. Cumaraswar immunity be respected.

66. Finally, the Court wishes to point out that the questio immunity from legal process is distinct from the issue of compens for any damages incurred as a result of acts performed by the Ur Nations or by its agents acting in their official capacity.

The United Nations may be required to bar responsibility for damage arising from such acts. However, as it clear from Article Section 29, of the General Convention, any such claims against United Nations shall not be dealt with by national courts but shal settled in accordance with the appropriate modes of settlement that "[ United Nations shall make provisions for" pursuant of Section 29.

Furthermore, it need hardly be said that all agents of the Un Nations, in whatever official capacity they act, must take care nc exceed the scope of their functions, and should so comport themse as to avoid claims against the United Nations.

67. For these reasons

THE COURT

*is of the opinion:*

(1) (*a*) By fourteen votes to one,

That Article VI, Section 22, of the Convention on the Privileges Immunities of the United Nations is applicable in the case of D

ram Cumaraswamy as Special Rapporteur of the Commission on
ıman Rights on the Independence of Judges and Lawyers;

FAVOUR : *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui Guillaume, Ranjeeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek;

GAINST : *Judge* Koroma;

) By fourteen votes to one,

That Dato' Param Cumaraswamy is entitled to immunity from legal ocess of every kind for the words spoken by him during an interview published in an article in the November 1995 issue of *International ommercial Litigation*;

FAVOUR : *President* Schwebel; *Vice-President* Weeramantry; Judges Oda, Bedjaoui Guillaume, Ranjeve, Herczegh, Shi, Fleischhauer, Veereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek;

GAINST : *Judge* Koroma;

) (*a*) By thirteen votes to two,

That the Government of Malaysia had the obligation to inform the alaysian courts of the finding of the Secretary-General that Dato' Param umaraswamy was entitled to immunity from legal process;

FAVOUR : *President* Schwebel; *Vice-President* Weeramantry: *Judges* Bedjaoui Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereschetin, Higgins, Parra-Aranguren, Kooijmans, Rezek;

GAINST : *Judges* Oda, Koroma;

(b) By fourteen votes to one,

That the Malaysian courts had the obligation to deal with the question immunity from legal process as a preliminary issue to the peditiously decided *in limine litis*;

FAVOUR : *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek;

AGAINST : *Judge* Koroma;

(3) Unanimously,

That Dato' Param Cumaraswamy shall be held financially har
for any costs imposed upon him by the Malaysian courts, in part
taxed costs.

(4) By thirteen votes to two,

That the Government of Malaysia has the obligation to commu
this advisory opinion to the Malaysian courts, in order that Mala
international obligations be given effect and Dato' P
Cumaraswamy's immunity be respected;

IN FAVOUR : *President* Schwebel; *Vice-President* Weeramantry; *J*
Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleishh
Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, R

AGAINST : *Judges* Oda, Koroma

Done in English and French, the English text being authoritati
the Peace Palace, The Hague, this twenty-ninth day of April,
thousand nine hundred and ninety-nine, in two copies, of which
will be placed in the archives of the Court and the other transmitt
the Secretary-General of the United Nations.

*(Signed)* Stephen M. Schw
President

*(Signed)* Eduardo Valencia-Os
Registrar.

Vice-President WEERAMANTRY, Judges Oda, and REZEK ap
separate opinions to the Advisory Opinion of the Court.*

Judge KOROMA appends a dissenting opinion to the Advi
Opinion of the Court.*

*(Initialled)* S.

*(Initialled)* E.

* The separate and dissenting opinions have not been reproduced in this *Journal.*

# OFFICIAL DOCUMENTS

## A. SELECT RESOLUTIONS OF THE UN SECURITY COUNCIL, 1998

### 1. Imposition of arms embargo on Federal Republic of Yugoslavia*

The Security Council,

*Noting* with appreciation the statements of the Foreign Ministers of France, Germany, Italy, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America (the Contact Group) of 9 and 25 March 1998 (S/1998/223 and S/1998/272), including the proposal on a comprehensive arms embargo on the Federal Republic of Yugoslavia, including Kosovo,

*Welcoming* the decision of the Special Session of the Permanent Council of the Organization for Security and Cooperation in Europe (OSCE) of 11 March 1998 (S/1998/246),

*Condemning* the use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosovo, as well as all acts of terrorism by the Kosovo Liberation Army or any other group or individual and all external support for terrorist activity in Kosovo, including finance, arms and training,

*Noting* the declaration of 18 March 1998 by the President of the Republic of Serbia on the political process in Kosovo and Metohija (S/1998/250),

*Noting also* the clear commitment of senior representatives of the Kosovar Albanian community to non-violence,

*Noting* that there has been some progress in implementing the actions indicated in the Contact Group statement of 9 March 1998, but stressing that further progress is required,

*Affirming* the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia,

*Acting* under Chapter VII of the Charter of the United Nations,

1. *Calls upon* the Federal Republic of Yugoslavia immediately to take the further necessary steps to achieve a political solution to the issue of Kosovo through dialogue and to implement the actions indicated in the Contact Group statements of 9 and 25 March 1998;

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* Source: UN DOC S/RES/1160 of 31 March 1998 adopted with a vote 14-0-1 at its 3868th meeting.

2. *Calls also upon* the Kosovar Albanian leadership to conde terrorist action, and emphasizes that all elements in the Ko Albanian community should pursue their goals by peaceful means

3. *Underlines* that the way to defeat violence and terrorism in K is for the authorities in Belgrade to offer the Kosovar Alb community a genuine political process;

4. *Calls upon* the authorities in Belgrade and the leadership Kosovar Albanian community urgently to enter without precond into a meaningful dialogue on political status issues, and note readiness of the Contact Group to facilitate such a dialogue;

5. *Agrees*, without prejudging the outcome of that dialogue, the proposal in the Contact Group statements of 9 and 25 March that the principles for a solution of the Kosovo problem should be on the territorial integrity of the Feeral Republic of Yugoslavia should be in accordance with OSCE standards, including those se in the Helsinki Final Act of the Conference on Security and Cooper in Europe of 1975, and the Charter of the United Nations, and that a solution must also take into account the rights of the Kosovar Alba and all who live in Kosovo, and *expresses its support* for an enha status for Kosovo which would include a substantially greater de of autonomy and meaningful self-administration;

6. *Welcomes* the signature on 23 March 1998 of an agreemen measures to implement the 1996 Education Agreement, *calls upo* parties to ensure that its implementation proceeds smoothly and wit delay according to the agreed time-table and *expresses its readines* consider measures if either party blocks implementation;

7. *Expresses its support* for the efforts of the OSCE for a peac resolution of the crisis in Kosovo, including through the Pers Representative of the Chairman-in-Office for the Federal Republi Yugoslavia, who is also the Special representative of the Euro Union, and the return of the OSCE long-term missions;

8. *Decides* that all States shall, for the purposes of fostering p and stability in Kosovo, prevent the sale or supply to the Federal Repu of Yugoslavia, including Kosovo, by their nationals or from t territories or using their flag vessels and aircraft, of arms and rel *matériel* of all types, such as weapons and ammunition, military vehi and equipment and spare parts for the aforementioned, and shall pre arming and training for terrorist activities there;

9. *Decides* to establish, in accordance with rule 28 of its provisi rules of procedure, a committee of the Security Council, consistin all the members of the Council, to undertake the following tasks an

port on its work to the Council with its observations and commendations:

(*a*) to seek from all States information regarding the action taken by them concerning the effective implementation of the prohibitions imposed by this resolution;

(*b*) to consider any information brought to its attention by any State concerning violations of the prohibitions imposed by this resolution and to recommend appropriate measures in response thereto;

(*c*) to make periodic reports to the Security Council on information submitted to it regarding alleged violations of the prohibitions imposed by this resolution;

(*d*) to promulgate such guidelines as may be necessary to facilitate the implementation of the prohibitions imposed by this resolution;

(*e*) to examine the reports submitted pursuant to paragraph 12 below;

10. *Calls upon* all States and all international and regional rganization to act strictly in conformity with this resolution, otwithstanding the existence of any rights granted or obligations onferred or imposed by any international agreement or of any contract ntered into or any license or permit granted prior to the entry into orce of the prohibitions imposed by this resolution, and stresses in this ontext the importance of continuing implementation of the Agreement f Subregional Arms Control signed in Florence on 14 June 1996;

11. *Requests* the Secretary-General to provide all necessary assistance o the committee established by paragraph 9 above and to make the ecessary arrangements in the Secretariat for this purpose;

12. *Requests* States to report to the committee established by aragraph 9 above within 30 days of adoption of this resolution on the teps they have taken to give effect to the prohibitions imposed by this esolution;

13. *Invites* the OSCE to keep the Secretary-General informed on the ituation in Kosovo and on measures taken by that organization in this egard;

14. *Requests* the Secretary-General to keep the Council regularly nformed and to report on the situation in Kosovo and the nplementation of this resolution no later than 30 days following the doption of this resolution and every 30 days thereafter;

15. *Further requests* that the Secretary-General, in consultation with ppropriate regional organizations, include in his first report

recommendations for the establishment of a comprehensive regim monitor the implementation of the prohibitions imposed by resolution, and calls upon all States, in particular neighbouring St to extend full cooperation in this regard;

16. *Decides* to review the situation on the basis of the reports o Secretary-General, which will take into account the assessments of, *i alia*, the Contact Group, the OSCE and the European Union, and *dec also* to reconsider the prohibitions imposed by this resolution, inclu action to terminate them, following receipt of the assessment of Secretary-General that the government of the Federal Republi Yugoslavia, cooperating in a constructive manner with the Con Group, have:

(*a*) begun a substantive dialogue in accordance with paragrap above, including the participation of an outside representa or representatives, unless any failure to do so is not becaus the position of the Federal Republic of Yugoslavia or Serb authorities;

(*b*) withdrawn the special police units and ceased action by security forces affecting the civilian population;

(*c*) allowed access to Kosovo by humanitarian organizations as w as representatives of Contact Group and other embassies;

(*d*) accepted a mission by the Personal Representative of the OS Chairman-in-Office for the Federal Republic of Yugoslavia t would include a new and specific mandate for addressing problems in Kosovo, as well as the return of the OSCE lo term missions;

(*e*) facilitated a mission to Kosovo by the United Nations Hi Commissioner for Human Rights;

17. *Urges* the Office of the Prosecutor of the International Tribu established pursuant to resolution 827 (1993) of 25 May 1993 to be gathering information related to the violence in Kosovo that may f within its jurisdiction, and *notes* that the authorities of the Fede Republic of Yugoslavia have an obligation to cooperate with the Tribu and that the Contact Group countries will make available to the Tribu substantiated relevant information in their possession;

18. *Affirms* that concrete progress to resolve the serious politi and human rights issues in Kosovo will improve the international positi of the Federal Republic of Yugoslavia and prospects for normalizati of its international relationships and full participation in internatio institutions;

19. *Emphasizes* that failure to make constructive progress towards the peaceful resolution of the situation in Kosovo will lead to the consideration of additional measures;

20. *Decides* to remain seized of the matter.

**Vote on resolution 1160:**

| | |
|---|---|
| In favour : | Bahrain, Brazil, Costa Rica, France, Gambia, Japan, Kenya, Portugal, Russian Federation, Slovenia, Sweden, United Kingdom, United States. |
| Against : | None. |
| Abstaining : | China. |

## 2. Establishment of third Trial Chamber of International Tribunal for Rwanda*

*The Security Council,*

*Reaffirming* its resolution 955 (1994) of 8 November 1994,

*Recalling* its decision in that resolution to consider increasing the number of judges and Trial Chambers of the International Tribunal for Rwanda if it becomes necessary,

*Remaining* convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law will contribute to the process of national reconciliation and to the restoration and maintenance of peace in Rwanda and in the region,

*Stressing* the need for international cooperation to strengthen the courts and judicial system of Rwanda, having regard in particular to the necessity for those courts to deal with a large number of accused awaiting trial,

*Having considered* the letter of the President of the International Tribunal for Rwanda, transmitted by identical letters from the Secretary-General to the Presidents of the Security Council and the General Assembly dated 15 October 1997 (S/1997/812),

*Convinced* of the need to increase the number of judges and Trial Chambers, in order to enable the International Tribunal for Rwanda to try without delay the large number of accused awaiting trial,

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* *Source*: UN DOC S/RES/1165 of 30 April 1998 adopted unanimously at its 3877th meeting.

*Noting* the progress being made in improving the effi functioning of the International Tribunal for Rwanda, and conv of the need for its organs to continue their efforts to further such pro

*Acting* under Chapter VII of the Charter of the United Nation

1. *Decides* to establish a third Trial Chamber of the Internat Tribunal for Rwanda, and to this end decides to amend articles 1 and 12 of the Statute of the Tribunal and to replace those articles the provisions set out in the annex to this resolution;

2. *Decides* that the elections for the judges of the three Chambers shall be held together, for a term of office to expire o May 2003;

3. *Decides* that, as an exceptional measure to enable the third Chamber to begin to function at the earliest possible date and wit prejudice to Article 12, paragraph 5, of the Statute of the Internati Tribunal for Rwanda, three newly elected judges, designated by Secretary-General in consultation with the President of the Internati Tribunal, shall commence their term of office as soon as poss following the elections;

4. *Urges* all States to cooperate fully with the International Trib for Rwanda and its organs in accordance with resolution 955 (19 and *welcomes* the cooperation already extended to the Internatio Tribunal in the fulfilment of its mandate;

5. *Urges* also the organs of the International Tribunal for Rwa actively to continue their efforts to increase further the efficiency of work of the International Tribunal in their respective areas and in connection *further calls upon* them to consider how their procedu and methods of work could be enhanced, taking into account relev recommendations in this regard;

6. *Requests* the Secretary-General to make practical arrangeme for the elections mentioned in paragraph 2 above and for enhanc the effective functioning of the International Tribunal for Rwan including the timely provision of personnel and facilities, in partic for the third Trial Chamber and related offices of the Prosecutor, further requests him to keep the Security Council closely informed progress in this regard;

7. *Decides* to remain actively seized of the matter.

## ANNEX

## STATUTE OF THE INTERNATIONAL TRIBUNAL FOR RWANDA

### Article 10

### Organization of the International Tribunal for Rwanda

The International Tribunal for Rwanda shall consist of the following rgans:

(*a*) The Chambers, comprising three Trial Chambers and an Appeals Chamber;

(*b*) The Prosecutor;

(*c*) A Registry.

### Article 11

### Composition of the Chambers

The Chambers shall be composed of fourteen independent judges, no two of whom may be nationals of the same State, who shall serve as follows:

(*a*) Three judges shall serve in each of the Trial Chambers;

(*b*) Five judges shall serve in the Appeals Chamber.

### Article 12

### Qualification and election of judges

1. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chamber due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

2. The members of the Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter referred to as "the International Tribunal for the Former Yugoslavia") shall also serve as the members of the Appeals Chamber of the International Tribunal for Rwanda.

3. The judges of the Trial Chambers of the International Trib for Rwanda shall be elected by the General Assembly from a submitted by the Security Council, in the following manner:

(*a*) The Secretary-General shall invite nominations for judges o Trial chambers from States Members of the United Nations and member States maintaining permanent observer missions at Ur Nations Headquarters;

(*b*) Within thirty days of the date of the invitation of the Secret General, each State may nominate up to two candidates meeting qualifications set out in paragraph 1 above, no two of whom shall b the same nationality and neither of whom shall be of the same nation as any judge on the Appeals Chamber;

(*c*) The Secretary-General shall forward the nominations recei to the Security Council. From the nominations received, the Secu Council shall establish a list of not less than eighteen and not more t twenty-seven candidates, taking due account of adequate representa on the International Tribunal for Rwanda of the principal legal syst of the world;

(*d*) The President of the Security Council shall transmit the list candidates to the President of the General Assembly. From that list, General Assembly shall elect the nine judges of the Trial Chamb The candidates who receive an absolute majority of the votes of States Members of the United Nations and of the non-member Sta maintaining permanent observer missions at United Nati Headquarters shall be declared elected. Should two candidates of same nationality obtain the required majority vote, the one who recei the higher number of votes shall be considered elected.

4. In the event of a vacancy in the Trial Chambers, after consultat with the Presidents of the Security Council and the General Assemb the Secretary-General shall appoint a person meeting the qualificati of paragraph 1 above, for the remainder of the term of office concern

5. The judges of the Trial Chambers shall be elected for a term four years. The terms and conditions of service shall be those of judges of the International Tribunal for the Former Yugoslavia. Th shall be eligible for re-election.

## 3. Establishment of third Trial Chamber of International Tribunal for Former Ygoslavia*

ie Security Council,

*Reaffirming* its resolution 827 (1993) of 25 May 1993,

Remaining convinced that the prosecution of persons responsible r serious violations of international humanitarian law committed in e territory of the former Yugoslavia contributes to the restoration and aintenance of peace in the former Yugoslavia,

*Having considered* the letter from the Secretary-General to the esident of the Security Council dated 5 May 1998 (S/1998/376),

*Cónvinced* of the need to increase the number of judges and Trial hambers, in order to enable the International Tribunal for the rosecution of Persons Responsible for Serious Violations of ternational Humanitarian Law Committed in the Territory of the Former ugoslavia since 1991 ("the International Tribunal") to try without delay e large number of accused awaiting trial,

*Noting* the significant progress being made in improving the rocedures of the International Tribunal, and *convinced* of the need for s organs to continue their efforts to further such progress,

*Acting* under Chapter VII of the Charter of the United Nations,

1. *Decides* to establish a third Trial Chamber of the International ribunal, and to this end *decides* to amend articles 11, 12 and 13 of the tatute of the International Tribunal and to replace those articles with ie provisions set out in the annex to this resolution;

2. *Decides* that three additional judges shall be elected as soon as ossible to serve in the additional Trial Chamber, and decides also, ithout prejudice to article 13.4 of the Statute of the International ribunal, that once elected they shall serve until the date of the expiry the terms of office of the existing judges, and that for the purpose of at election the Security Council shall, notwithstanding article 13.2 (c) the Statute, establish a list from the nominations received of not less ian six and not more than nine candidates;

3. *Urges* all States to cooperate fully with the International Tribunal id its organs in accordance with their obligations under resolution 27 (1993) and the Statute of the International Tribunal and welcomes

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*Source*: UNDOC S/RES/1166 of 13 May 1998 adopted unanimously at its 3878th meeting.

the cooperation already extended to the tribunal in the fulfil
mandate;

4. *Requests* the Secretary-General to make practical arr
to for the elections mentioned in paragraph 2 above and for
the effective functioning of the International Tribunal, inc
timely provision of personnel and facilities, in particular fo
Trial Chamber and related offices of the Prosecutor, and furth
him to keep the Security Council closely informed of progr
regard;

5. *Decides* to remain actively seized of the matter.

## ANNEX

### Article 11

Organization of the International Tribunal

The International Tribunal shall consist of the following

(*a*) The Chambers, comprising three Trial Chambers and ar
Chamber,

(*b*) The Prosecutor, and

(*c*) A Registry, servicing both the Chambers and the Pros

### Article 12

Composition of the Chambers

The Chamber shall be composed of fourteen independen
no two of whom may be nationals of the same State, who shall
follows:

(*a*) Three judges shall serve in each of the Trial Chamber

(*b*) Five judges shall serve in the Appeals Chamber.

### Article 13

Qualifications and election of judges

1. The judges shall be persons of high moral character, im
and integrity who possess the qualifications required in their r
countries for appointment to the highest judicial offices. In th
composition of the Chambers due account shall be take

ience of the judges in criminal law, international law, including
national humanitarian law and human rights law.

The judges of the International Tribunal shall be elected by the
ral Assembly from a list submitted by the Security Council, in the
wing manner:

*a*) The Secretary-General shall invite nominations for judges of the
national Tribunal from States Members of the United Nations and
member States maintaining permanent observer missions at United
ons Headquarters;

*b*) Within sixty days of the date of the invitation of the Secretary-
eral, each State may nominate up to two candidates meeting the
fications set out in paragraph 1 above, no two of whom shall be of
ame nationality;

*c*) The Secretary-General shall forward the nominations received
e Security Council. From the nominations received the Security
ncil shall establish a list of not less than twenty-eight and not more
forty-two candidates, taking due account of the adequate
esentation of the principal legal systems of the world;

*d*) The President of the Security Council shall transmit the list of
idates to the President of the General Assembly. From that list the
eral Assembly shall elect the fourteen Judges of the International
unal. The candidates who receive an absolute majority of the votes
e States Member of the United Nations and of the non-member
es maintaining permanent observer missions at United Nations
lquarters, shall be declared elected. Should two candidates of the
nationality obtain the required majority vote, the one who received
igher number of votes shall be considered elected.

. In the event of a vacancy in the Chambers, after consultation
the Presidents of the Security Council and of the General Assembly,
Secretary-General shall appoint a person meeting the qualifications
ragraph 1 above, for the remainder of the term of office concerned.

. The judges shall be elected for a term of four years. The terms
conditions of service shall be those of the judges of the International
t of Justice. They shall be eligible for re-election.

## 4. Condemnation of terrorist attacks in Nairobi and Dar es Salaam*

*The Security Council,*

*Deeply disturbed* by the indiscriminate and outrageous ac international terrorism that took place on 7 August 1998 in Nai Kenya and Dar-es-Salaam, Tanzania,

*Condemning* such acts which have a damaging effect on internat relations and jeopardize the security of States,

*Convinced* that the suppression of acts of international terroris essential for the maintenance of international peace and security, reaffirming the determination of the international community to elimi international terrorism in all its forms and manifestations,

*Also reaffirming* the obligations of Member States under the Ch of the United Nations,

*Stressing* that every Member State has the duty to refrain f organizing, instigating, assisting or participating in terrorist act another State or acquiescing in organized activities whthin its terri directed towards the commission of such acts,

*Mindful* of General Assembly resolution 52/164 of 15 Decem 1997 on the International Convention for the Suppression of Terro Bombings,

*Recalling* that, in the statement issued on 31 January 1992 (S/23 on the occasion of the meeting of the Security Council at the leve Heads of State and Government, the council expressed its deep con over acts of international terrorism, and emphasized the need for international community to deal effectively with all such criminal a

*Also stressing* the need to strengthen international coopera between States in order to adopt practical and effective measure prevent, combat and eliminate all forms of terrorism affecting international community as a whole,

*Commending* the responses of the Governments of Kenaya, Tanz and the United States of America to the terrorist bomb attacks in Ke and Tanzania,

*Determined* to eliminate international terrorism,

1. *Strongly condemns* the terrorist bomb attacks in Nairobi, Ke and Dar-es-Salaam, Tanzania on 7 August 1998 which claimed hund

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* *Source*: UNDOC S/RES/1189 of 13 August 1998 adopted unanimously at its 39 meeting.

innocent lives, injured thousands of people and caused massive struction to property;

2. *Expresses* its deep sorrow, sympathy and condolences to the nilies of the innocent victims of the terrorist bomb attacks during this ficult time;

3. *Calls upon* all States and international institutions to cooperate th and provide support and assistance to the ongoing investigations Kenya, Tanzania and the United States to apprehend the perpetrators these cowardly criminal acts and to bring them swiftly to justice;

4. *Expresses* its sincere gratitude to all States, international institutions d voluntary organizations for their encouragement and timely sponse to the requests for assistance from the Governments of Kenya d Tanzania, and urges them to assist the affected countries, especially the reconstruction of infrastructure and disaster preparedness;

5. *Calls upon* all States to adopt, in accordance with international w and as a matter of priority, effective and practical measures for curity cooperation, for the prevention of such acts of terrorism, and r the prosecution and punishment of their perpetrators;

6. *Decides* to remain seized of the matter.

## 5. Condemnation of attacks on UN personnel in Afghanistan*

*ie Security Council,*

*Having considered* the situation in Afghanistan,

*Recalling* its previous resolution 1076 (1996) of 22 October 1996 id the statements of the President of the Security Council on the tuation in Afghanistan,

*Recalling also* resolution 52/211 of the General Assembly,

*Expressing its grave concern* at the continued Afghan conflict which is recently sharply escalated due to the Taliban forces' offensive in e northern parts of the country, causing a serious and growing threat regional and international peace and security, as well as extensive iman suffering, further destruction, refugee flows and other forcible splacement of large number of people,

*Concerned* also by the increasingly ethnic nature of the conflict, by ports of ethnic and religious-based persecution, particularly against

*Source*: UNDOC S/RES/1193 of 28 August 1998 adopted unanimously at its 3921st meeting.

the Shiites, and by the threat this poses to the unity of the Afghan

*Reffirming* its strong commitment to the sovereignty, indepen territorial integrity and national unity of Afghanistan, and its r for its cultural and historical heritage,

*Deploring* the fact that despite repeated pleas by the Security Co the General Assembly and the Secretary-Genral to halt fo interference in Afghanistan, including the involvement of fo military personnel and the supply of arms and ammunition to all p in the conflict, such interference continues unabated,

*Reiterating its view* that the United Nations must continue to pl central and impartial role in international efforts towards a pea resolution of the Afghan conflict,

*Deeply concerned* at the serious humanitarian crisis in Afghan and *deploring* in this regard the measures taken by the Taliban v resulted in the evacuation of the United Nations humanitarian pers from Afghanistan and *expressing hope* for their early return u conditions of security,

*Expressing its grave concern* at the capture by the Taliban o Consulate-General of the Islamic Republic of Iran in Mazar-e-S and at the fate of the personnel of the Consulate-General and of Iranian nationals missing in Afghanistan,

*Deeply disturbed* by the deteriorating security conditions for U Nations and other international and humanitarian personnel,

*Deeply concerned* also at the continuing presence of terroris the territory of Afghanistan and at the production and traffickin drugs,

*Remaining deeply concerned* at the continuing discrimina against girls and women and at other violations of human rights ar international humanitarian law in Afghanistan,

1. *Reiterates* that the Afghan crisis can be settled only by pea means, through direct negotiations between the Afghan factions u United Nations auspices, aimed at achieving a solution accommod the rights and interests of all Afghans and *stresses* that territorial through military operations will neither lead to a durable peac Afghanistan, nor contribute to a comprehensive settlement of conflict in this multi-cultrual and multi-ethnic country;

2. *Demands* that all Afghan factions stop fighting, res negotiations without delay and preconditions, and cooperate wit aim of creating a broad-based and fully representative governn which would protect the rights of all Afghans and would observe

ernational obligations of Afghanistan;

3. *Reiterates* once again that any outside interference in the internal airs of Afghanistan should cease immediately and *calls* upon all States take resolute measures to prohibit their military personnel from anning and participating in military operations in Afghanistan and mediately to end the supply of arms and ammunition to all parties to e conflict;

4. *Calls upon* all States neighbouring Afghanistan and other States th influence in the country to intensify their efforts under the aegis of e United Nations to bring the parties to a negotiated settlement;

5. *Reaffirms* its full support for the efforts of the United Nations, in rticular the activities of the United Nations Special Mission to fghanistan and those of the Special Envoy of the United Nations cretary-General for Afghanistan in facilitating the political process wards the goals of national reconciliation and a lasting political ttlement with the participation of all parties to the conflict and all gments of Afghan society;

6. *Condemns* the attacks on the United Nations personnel in the aliban-held territories of Afghanistan, including the killing of the two fghan staff-members of the World Food Programme and of the United ations High Commissioner for Refugees in Jalalabad, and of the ilitary Adviser to the United Nations Special Mission to Afghanistan Kabul, and calls upon the Taliban to investigate urgently these heinous imes, and to keep the Untied Nations informed about the results of e investigation;

7. *Demands* that all Afghan factions and, in particular the Taliban, o everything possible to assure the safety and freedom of movement the personnel of the Untied Nations and other international and umanitarian personnel;

8. *Condemns also* the capture of the Consulate-General of the Islamic epublic of Iran in Mazar-e-Sharif, and *demands* that all parities and, particular the Taliban, do everything possible to ensure safe and gnified passage out of Afghanistan of the personnel of the Consulate-eneral and other Iranian nationals missing in Afghanistan;

9. *Urges* all Afghan factions and, in particular the Taliban, to cilitate the work of the international humanitarian organizations and ensure unimpeded access and adequate conditions for the delivery aid by such organizations to all in need of it;

10. *Appeals* to all States, organizations and programmes of the United ations system, specialized agencies and other international

organizations to resume the provision of humanitarian assistance in need of it in Afghanistan as soon as the situation on the g permits;

11. *Expresses* its readiness to call, on a priority basis, for all po financial, technical and material assistance for the reconstructi Afghanistan once the conditions are established by the achievem the lasting peaceful solution of the Afghan conflict, and for the volu safe and secure return of refugees and internally displaced perso

12. *Reaffirms* that all parties to the conflict are bound to co with their obligations under international humanitarian law a particular the Geneva Conventions of 12 August 1949, and that pe who commit or order the commission of grave breaches o Conventions are individually responsible in respect of such brea

13. *Requests* the Secretary-General to continue investigations alleged mass killings of prisoners of war and civilians as we ethnically-based forced displacement of large groups of the popul and other forms of mass persecution in Afghanistan, and to submi reports to the General Assembly and the Security Council as soo they become available;

14. *Urges* the Afghan factions to put an end to the discrimin against girls and women and to other violations of human rights as as violations of international humanitarian law and to adhere to internationally accepted norms and standards in this sphere;

15. *Demands* the Afghan factions to refrain from harbouring training terrorists and their organizations and to halt illegal drug activ

16. *Reminds* all parties of the obligation to abide strictly by decisions of the Security Council and expresses its firm intentio accordance with its repressibility under the Charter, to consider further steps as may be required for the implementation of this resolu

17. *Requests* the Secretary-General to continue to keep it regu informed of the situation in Afghanistan;

18. *Decides* to remain actively seized of the matter.

## 6. Strengthening peacekeeping mechanisms in Africa*

*The Security Council,*

*Reaffirming* its primary responsibility for the maintenanc

* *Source*: UNDOC S/RES/1197 of 18 September 1998 adopted unanimously 3928th meeting.

nternational peace and security in accordance with the Charter of the Inited Nations,

*Having* considered the recommendations contained in the report of he Secretary-General of 13 April 1998 on "The causes of conflict and he promotion of durable peace and sustainable development in Africa", vhich was submitted to the General Assembly (A/52/871) and to the Security Council (S/1998/318), regarding the need for the United Nations o provide support for regional and subregional initiatives and the trengthening of coordination between the United Nations and regional ind subregional organizations in the area of conflict prevention and the naintenance of peace,

*Recalling* the provisions of Chapter VIII of the Charter of the United Nations on regional arrangements or agencies, which set out the basic principles governing their activities, and establish the legal framework for cooperation with the United Nations, in the area of the maintenance of international peace and security,

*Recalling also* the agreement of 15 November 1965 on cooperation between the United Nations and the Organization of African Unity (OAU) as updated and signed on 9 October 1990 between the two Secretaries-General of the two organizations,

*Recalling further* the resolutions of the General Assembly on the enhancement of cooperation between the United Nations and the OAU, in particular resolutions 43/12 of 25 October 1988, 43/27 of 18 November 1988, 44/17 of 1 November 1991, 47/148 of 18 December 1992, 48/25 of 29 November 1993, 49/64 of 15 December 1994, and 50/158 of 21 December 1995,

*Mindful* of the need for continued cooperation between the United Nations and its relevant bodies and specialized agencies on the one hand, and the OAU and subregional organizations in Africa on the other,

*Welcoming* the high-level meeting between the United Nations and regional organizations held in New York on 28 July 1998 and *encouraging* the holding of such meeting at regular intervals,

*Noting* that subregional arrangements in Africa, as well as the OAU through its Mechanism for Conflict Prevention, Management and Resolution, are developing their capacities in preventive diplomacy, and *encouraging* African States to make use of these arrangements and mechanisms in the prevention of conflict and maintenance of peace in Africa,

I

1. *Urges* the Secretary-General, though the use of the United Nations

Trust Fund for Improving Preparedness for Conflict Prevention Peacekeeping in Africa, to assist in the establishment within the of an early warning system based on the model currently being use the United Nations, and to assist in strengthening in making operati the OAU conflict management centre and its situation room;

2. *Encourages* contributions to the United Nations Trust Fund Improving Preparedness for Conflict Prevention and Peacekeepin Africa and to the OAU Peace Fund and encourages also the Secre General to develop a strategy for enhancing contributions to the T Fund;

3. *Requests* the Secretary-General to continue to assist Member St in the further development of commonly accepted peacekeeping doct and to share existing peacekeeping doctrine and concepts of operati with the OAU and subregional organizations in Africa;

4. *Invites* the Secretary-General to assist the OAU and subregio organizations in Africa to establish logistics assessment teams thro the sharing of information on the establishment, composition, meth and functioning of United Nations logistics assessment teams, and a *invites* the Secretary-General to assist the OAU and subregio organizations, as appropriate, to determine the logistical and financ requirements of regional or subregional peacekeeping operatio authorized by the Council;

5. *Encourages* the establishment of partnerships between States a regional and subregional organizations involved in peacekeepi operations, in which one or more States or organizations contrib troops and others contribute equipment, *encourages* the Secreta General to facilitate efforts to that end, and requests him to consi developing a framework to coordinate such partnerships;

6. *Commends* the various initiatives taken by several States enhance African preparedness to participate in the military, poli humanitarian and other civilian components of peacekeeping operatio and in this context *encourages* joint training and simulation exerci and seminars with African peacekeepers;

7. *Welcomes* the proposal by the Economic Community of W African States (ECOWAS) to establish a Council of Elders within Mechanism for the Prevention, Management, Resolution of Conflic Peacekeeping and Security for the purpose of facilitating mediati efforts and *urges* the Secretary-General, in consultation with t Executive Secretary of ECOWAS, to assist in facilitating its establishm and to help to ensure its effectiveness;

II

8. *Endorses* the establishment of a United Nations Preventive Action .iaison Office in the OAU and *urges* the Secretary-General to consider ays of making this office more effective and also the possibility of ppointing liaison officers to peacekeeping operations of the OAU and f subregional organizations in Africa which are authorized by the 'ouncil;

9. *Encourages* the enhancement of consultation and coordination etween the United Nations and the OAU and between the United Jations and subregional organizations in Africa, both at the field and eadquarters level, and *recognizes* that the nomination of joint Special ɛepresentatives may be useful to further these aims;

10. *Welcomes* the fact that both the United Nations and the OAU ave agreed to strengthen and broaden their cooperation on measures o prevent and resolve conflicts in Africa, and in this regard invites the ecreatry-General to:

(*a*) Adopt measures for an improved flow of information through ystematic mechanisms between the United Nations and OAU and etween the United Nations and subregional organizations in Africa,

(*b*) Develop, in collaboration with the OAU and with subregional rganizations in Africa, common indicators for early warning, and share, s appropriate, early warning information both on the ground with their ield representatives and with their headquarters,

(*c*) Arrange, in collaboration with the OAU and with subregional rganizations in Africa, occasional visits of staff a working level between he United Nations and the OAU and between the United Nations and ubregional organizations in Africa,

(*d*) Arrange, in collaboration with the OAU and with subregional rganizations in Africa, joint expert meetings on certain specific areas f early warning and prevention, including joint reviews of potential nd existing conflicts with a view to coordinating initiatives and actions;

11. *Requests* the Secretary-General to implement the present esolution in the course of his ongoing efforts to develop cooperation vith the OAU and subregional organizations in Africa and, where ecessary, drawing on the United nations Trust Fund for Improving 'reparedness for Conflict Prevention and Peacekeeping in Africa, and o keep the Council informed periodically, as necessary, on the mplementation of the present resolution;

12. *Decides* to remain seized of the matter.

## 7. End to hostilities and maintainence of ceasefire in Koso

*The Security Council,*

*Recalling* its resolution 1160 (1998) of 31 March 1998,

*Having considered* the reports of the Secretary-General pursu that resolution, and in particular his report of 4 September 19 1998/834 and Add.1),

*Noting with appreciation* the statement of the Foreign Minist France, Germany, Italy, the Russian Federation, the United Kin of Great Britain and Northern Ireland and the United States of An (the Contact Group) of 12 June 1998 at the conclusion of the Co Group's meeting with the Foreign Ministers of Canada and Japa 1998/567, annex), and the further statement of the Contact Group in Bonn on 8 July 1998 (S/1998/657),

*Noting also with appreciation* the joint statement by the Presi of the Russian Federation and the Federal Republic of Yugoslav 16 June 1998 (S/1998/526),

*Noting further* the communication by the Prosecutor of International Tribunal for the Former Yugoslavia to the Contact C on 7 July 1998, expressing the view that the situation in Ko represents an armed conflict within the terms of the mandate o Tribunal,

*Gravely concerned* at the recent intense fighting in Kosovo a particular the excessive and indiscriminate use of force by Se security forces and the Yugoslav Army which have resulted in num civilian casualties and, according to the estimate of the Secre General, the displacement of over 230,000 persons from their ho

*Deeply concerned* by the flow of refugees into northern Alb Bosnia and Herzegovina and other European countries as a resu the use of force in Kosovo, as well as by the increasing numbe displaced persons within Kosovo, and other parts of the Federal Rep of Yugoslavia, up to 50,000 of whom the United Nations Commissioner for Refugees has estimated are without shelter and basic necessities,

*Reaffirming* the right of all refugees and displaced persons to homes in safety, and *underlining* the responsibility of the Fe Republic of Yugoslavia for creating the conditions which allow to do so,

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* *Source* : UN DOC S/RES/1199 of 23 September 1998 adopted with a vote 1 at its 3930th meeting.

*Condemning* all acts of violence by any party, as well as terrorism n pursuit of political goals by any group or individual, and all external upport for such activities in Kosovo, including the supply of arms and raining for terrorist activities in Kosovo and *expressing concern* at the eports of continuing violations of the prohibitions imposed by esolution 1160 (1998),

*Deeply concerned* by the rapid deterioration in the humanitarian ituation throughout Kosovo, alarmed at the impending humanitarian atastrophe as described in the report of the Secretary-General, and *mphasizing* the need to prevent this from happening,

*Deeply concerned* by reports of increasing violations of human rights nd of international humanitarian law, and *emphasizing* the need to nsure that the rights of all inhabitants of Kosovo are respected,

*Reaffirming* the objectives of resolution 1160 (1998), in which the Council expressed support for a peaceful resolution of the Kosovo problem which would include an enhanced status for Kosovo, a substantially greater degree of autonomy, and meaningful self-administration,

*Reaffirming* also the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia,

*Affirming* that the deterioration of the situation in Kosovo, Federal Republic of Yugoslavia, constitutes a threat to peace and security in the region,

*Acting* under Chapter VII of the Charter of the United Nations,

1. *Demands* that all parties, groups and individuals immediately case hostilities and maintain a ceasefire in Kosovo, Federal Republic of Yugoslavia, which would enhance the prospects for a meaningful dialogue between the authorities of the Federal Republic of Yugoslavia and the Kosovo Albanian leadership and reduce the risks of a humanitarian catastrophe;

2. *Demands also* that the authorities of the Federal Republic of Yugoclavia and the Kosovo Albanian leadership take immediate steps to improve the humanitarian situation and to avert the impending humanitarian catastrophe;

3. *Calls upon* the authorities in the Federal Republic of Yugoslavia and the Kosovo Albanian leadership to enter immediately into a meaningful dialogue without preconditions and with international nvolvement, and to a clear timetable, leading to an end of the crisis and to a negotiated political solution to the issue of Kosovo, and

*welcomes* the current efforts aimed at facilitating such a dialogue;

4. *Demands further* that the Federal Republic of Yugoslavia addition to the measures called for under resolution 1160 (19 implement immediately the following concrete measures tow achieving a political solution to the situation in Kosovo as containe the Contact Group statement of 12 June 1998:

(*a*) cease all action by the security forces affecting the civi population and order the withdrawal of security units used for civi repression;

(*b*) enable effective and continuous international monitoring Kosovo by the European Community Monitoring Mission and diplom missions accredited to the Federal Republic of Yugoslavia, includ access and complete freedom of movement of such monitors to, fr and within Kosovo unimpeded by government authorities, expeditious issuance of appropriate travel documents to internatio personnel contributing to the monitoring;

(*c*) facilitate, in agreement with the UNHCR and the Internatio Committee of the Red Cross (ICRC), the safe return of refugees displaced persons to their homes and allow free and unimpeded acc for humanitarian organizations and supplies of Kosovo;

(*d*) make rapid progress to a clear timetable, in the dialogue refer to in paragraph 3 with the Kosovo Albanian community called for resolution 1160 (1998), with the aim of agreeing confidence-buildi measures and finding a political solution to the problems of Kosovo

5. *Notes*, in this connection, the commitments of the President the Federal Republic of Yugoslavia, in his joint statement with President of the Russian Federation of 16 June 1998;

(*a*) to resolve existing problems by political means on the basis equality for all citizens and ethnic communities in Kosovo;

(*b*) not to carry out any repressive actions against the peace population;

(*c*) to provide full freedom of movement for and ensure that th will be no restrictions on representatives of foreign States a international institutions accredited to the Federal Republic Yugoslavia monitoring the situation in Kosovo;

(*d*) to ensure full and unimpeded access for humanitari organizations, the ICRC and the UNHCR, and delivery of humanitar supplies;

(*e*) to facilitate the unimpeded return of refugees and displac persons under programmes agreed with the UNHCR and the ICR

roviding State aid for the reconstruction of destroyed homes,

and *calls for* the full implementation of these commitments;

6. *Insists* that the Kosovo Albanian leadership condemn all terrorist ction, and *emphasizes* that all elements in the Kosovo Albanian ommunity should pursue their goals by peaceful means only;

7. *Recalls* the obligations of all Sates to implement fully the rohibitions imposed by resolution 1160 (1998);

8. *Endorses* the steps taken to establish effective international nonitoring of the situation in Kosovo, and in this connection welcomes he establishment of the Kosovo Diplomatic Observer Mission;

9. *Urges* States and international organizations represented in the Federal Republic of Yugoslavia to make available personnel to fulfil he resistibility of carrying out effective and continuous international nonitoring in Kosovo until the objectives of this resolution and those of resolution 1160 (1198) are achieved;

10. *Reminds* the Federal Republic of Yugoslavia that it has the primary responsibility for the security of all diplomatic personnel accredited to the Federal Republic of Yugoslavia as well as the safety and security of all international and non-governmental humanitarian personnel in the Federal Republic of Yugoslavia and *calls upon* the authorities of the Federal Republic of Yugoslavia and all others concerned in the Federal Republic of Yugoslavia to take all appropriate steps to ensure that monitoring personnel performing functions under his resolution are not subject to the threat or use of force or interference of any kind;

11. *Requests* States to pursue all means consistent with their domestic egislation and relevant international law to prevent funds collected on heir territory being used to contravene resolution 1160 (1998);

12. *Calls upon* Member States and others concerned to provide adequate resources for humanitarian assistance in the region and to respond promptly and generously to the United Nations consolidated nter-Agency Appeal for Humanitarian Assistance Related to the Kosovo Crisis;

13. *Calls upon* the authorities of the Federal Republic of Yugoslavia, he leaders of the Kosovo Albanian community and all others concerned o cooperate fully with the Prosecutor of the International Tribunal for he Former Yugoslavia in the investigation of possible violations within he jurisdiction of the Tribunal;

14. *Underlines* also the need for the authorities of the Fed Republic of Yugoslavia to bring to justice those members of the secu forces who have been involved in the mistreatment of civilians and deliberate destruction of property;

15. *Requests* the Secretary-General to provide regular reports to Council as necessary on his assessment of compliance with resolution by the authorities of the Federal Republic of Yugoslavia all elements in the Kosovo Albanian community, including through regular reports on compliance with resolution 1160(1998);

16. *Decides*, should the concrete measures demanded in t resolution and resolution 1160 (1998) not be taken, to consider furt action and additional measures to maintain or restore peace and stabi in the region;

17. *Decides* to remain seized of the matter.

**Vote on resolution 1199:**

| | |
|---|---|
| *In favour* : | Bahrain, Brazil, Costa Rica, France, Gabon, Gamb Japan, Kenya, Portugal, Russian Federation, Sloven Sweden, United Kingdom, United States. |
| *Against* : | None. |
| *Abstaining* : | China. |

## 8. Failure to execute International Tribunal arrest warrants

*The Security Council,*

*Recalling* all its previous relevant resolutions concerning t conflicts in the former Yugoslavia, in particular resolution 827 (19 of 25 may 1993,

*Recalling also* the statement by its President of 8 May 1996 (S/PRS 1996/23),

*Recalling further* the General Framework Agreement for Peace Bosnia and Herzegovina and the Annexes thereto (S/1995/999, anne in particular its Article IX and its Annex 1-A, Article X,

*Having considered* the letters of the President of the Internatio Tribunal for the Former Yugoslavia to the President of the Secur Council of 8 September 1998 (S/1998/839), 22 October 1998 (S/19

* *Source* : UN DOC S/RES/1207 of 17 November 1998 adopted with a vote 14 1 at its 3944th meeting.

0) and 6 November 1998 (S/1998/1040),

*Deploring* the continued failure of the Federal Republic of Yugoslavia cooperate fully with the Tribunal, as described in those letters,

*Reaffirming* the commitment of all Member States to the sovereignty d territorial integrity of the Federal Republic of Yugoslavia,

*Acting* under Chapter VII of the Charter of the United Nations,

1. *Reiterates* its decision that all States shall cooperate fully with the ibunal and its organs in accordance with resolution 827 (1993) and e Statute of the Tribunal, including the obligation of States to comply ith requests for assistance or orders issued by a Trial Chamber under rticle 29 of the Statute, to execute arrest warrants transmitted to them the Tribunal, and to comply with its requests for information and vestigations;

2. *Calls again upon* the Federal Republic of Yugoslavia, and other tates which have not already done so, to take any measures necessary nder their domestic law to implement the provisions of resolution 827 993) and the Statute of the Tribunal, and *affirms* that a State may not voke provisions of its domestic law as justification for its failure to erform binding obligations under international law;

3. *Condemns* the failure to date of the Federal Republic of Yugoslavia execute the arrest warrants issued by the Tribunal against the three dividuals referred to in the letter of 8 September 1998, and *demands* ne immediate and unconditional execution of those arrest warrants, cluding the transfer to the custody of the Tribunal of those individuals;

4. *Reiterates* its call upon the authorities of the Federal Republic of ugoslavia, the leaders of the Kosovo Albanian community and all thers concerned to cooperate fully with the Prosecutor in the vestigation of all possible violations within the jurisdiction of the ribunal;

5. *Requests* the President of the Tribunal to keep the Council formed about the implementation of this resolution for the Council's rther consideration;

6. *Decides* to remain seized of the matter.

**ote on resolution 1207:**

| | |
|---|---|
| *favour* : | Bahrain, Brazil, Costa Rica, France, Gabon, Gambia, Japan, Kenya, Portugal, Russian Federation, Slovenia, Sweden, United Kingdom, United States. |
| *gainst* : | None. |
| *bstaining* : | China. |

## 9. Status and treatment of refugees*

*The Security Council.*

*Reaffirming* its resolution 1170 (1998) of 28 May 1998,

*Reaffirming* also the statements of its President of 19 June 1997 PRST/1997/34), 16 September 1998 (S/PRST/1998/28) and September 1998 (S/PRST/1998/30),

*Emphasizing* that the provision of security to refugees and maintenance of the civilian and humanitarian character of refugee ca and settlements is an integral part of the national, regional international response to refugee situations and can contribute to maintenance of international peace and security,

*Having considered* the report of the Secretary-General of 13 A 1998 on the "Causes of Conflict and the Promotion of Durable Pe and Sustainable Development in Africa", which was submitted to General Assembly (A/52/871) and to the Security Council (S/1998/3 in accordance with the statement of its President of 25 September 1 (S/PRST/1997/46),

*Taking note* of the report of the Secretary-General of 22 Septem 1998 on the "Protection for Humanitarian Assistance to Refugees Others in Conflict Situations" (S/1998/883),

*Recognizing* the extensive experience of African States in hos refugees and in dealing with the effects of refugee camps and settleme

*Affirming* the civilian and humanitarian character of refugee ca and settlements, and in this regard underlining the unacceptability using refugees and other persons in refugee camps and settlement achieve military purposes in the country of asylum or in the country origin,

*Noting* the diverse causes of insecurity of refugee camps settlements in Africa, including, *inter alia*, the presence of armec military elements and other persons who do not qualify for internatic protection afforded refugees or otherwise do not require internatic protection, differences whith in the refugee population, conflicts betw refugees and the local population, common crime and banditry and flow of arms,

*Recognizing* the need to take steps to assist African States to impr the security of refugees and to maintain the civilian and humanita

* *Source* : UN DOC S/RES/1208 of 19 November 1998 adopted unanimously a 3945th meeting.

aracter of refugee camps and settlements in accordance with ernational refugee, human rights and humanitarian law,

*Stressing* the particular security needs of women, children and the derly, who are the most vulnerable groups in refugee camps and ttlements,

*Recalling* resolutions 52/103 and 52/132 of the General Assembly garding, respectively, the Office of the United Nations High ommissioner for Refugees (UNHCR) and human rights and mass oduses,

1. *Reaffirms* the importance of the principles relating to the status of fugees and the common standards for their treatment contained in the nited Nations Convention relating to the Status of Refugees of 18 ly 1951, as modified by the Protocol relating to the Status of refugees 31 January 1967;

2. *Underlines* the particular relevance of the provisions contained the Organization of African Unity (OAU) Convention Governing the pecific Aspects of Refugee Problems in Africa of 10 September 1969;

3. *Affirms* the primary responsibility of Sates hosting refugees to isure the security and civilian and humanitarian character of refugee imps and settlemnts in accordance with international refugee, human ghts and humanitarian law:

4. *Calls upon* African States further to develop institutions and ocedures to implement the provisions of international law relating to e status and treatment of refugees and the provisions of the OAU onvention, especially those relating to the location of refugees at a asonable distance from the frontier of their country of origin and the paration of refugees from other persons who do not qualify for ternational protection afforded refugees or otherwise do not require ternational protection, and in this regard urges African States to seek ternational assistance, as appropriate;

5. *Recognizes* the primary responsibility of the UNHCR, with the sistance of other relevant international bodies and organizations, to pport African States in their actions directed towards the full respect d implementation of the provisions of international law relating to e status and treatment of refugees, and requests the UNHCR, as eded, to keep in close touch with the Secretary-General, the OAU, bregional organizations and the States concerned in this regard;

6. *Notes* that a range of measures by he international community e needed to share the burden borne by African States hosting refugees d to support their efforts to ensure the security and civilian and

humanitarian character of refugee camps and settlements, includin the areas of law enforcement, disarmament of armed eleme curtailment of the flow of arms in refugee camps and settleme separation of refugees from other persons who do not qualify international protection afforded refugees or otherwise do not req international protection, and demobilization and reintegration of for combatants;

7. *Notes also* that the range of measures referred to in paragra above could include training, logistical and technical advice assistance, financial support, the enhancement of national enforcement mechanisms, the provision or supervision of secu guards and the deployment in accordance with the Charter of the Un Nations of international police and military fores;

8. *Requests* the Secretary-General to respond, as appropriate requests from African States, the OAU and subregional organizati for advice and technical assistance in the implementation of internatio refugee, human rights and humanitarian law relevant to the pres resolution, including through appropriate training programmes seminars;

9. *Urges* the UNHCR, other relevant United Nations bodies organizations, Member States, the OAU and subregional organizati to initate coordinated programmes to provide advice, training technical or other assistance, as appropriate, to African States wh host refugee populations, with a view to strengthening their capacity implement the obligations referred to in paragraph 4 above, *encourages* relevant non-governmental organizations to participate such coordinated programmes when appropriate;

10. *Encourages* the Secretary-General and Member States invol in efforts to enhance Africa's peacekeeping capacity to continue ensure that training gives due emphasis to international refugee, hun rights and humanitarian law and in particular to the security of refug and the maintenance of the civilian and humanitarian character refugee camps and settlements;

11. *Expresses its support* for the inclusion in the United Nati Stand-by Arrangements of military and police units and personnel trai for humanitarian operations, as well as related equipment, which relev United Nations bodies and organizations could draw on in provid advice, supervision, training and technical or other assistance rela to the maintenance of the security and civilian and humanitar character of refugee camps and settlements, in coordination appropriate with the African States hosting refugees;

2. *Requests* the Secretary-General to consider the establilshment new category within the United Nations Trust Fund for Improving aredness for Conflict Prevention and Peacekeeping in Africa to ort, as needed, and in addition to existing sources of funding, the ision of advice, supervision, training and technical or other tance related to the maintenance of the security and civilian and anitarian character of refugee camps and settlements, including e activities referred to in paragraph 11 above, and *urges* Member es to contribute to this Fund;

13. *Requests* the Secretary-General to continue his consultations Member States, regional and subregional organizations and other vant international bodies and organizations to keep it informed about elopments in Africa related to the security and civilian and anitarian character of refugee camps and settlements which affect maintenance of international peace and security in the region, and ecommend concrete measures, such as those mentioned in paragraph bove, as needed, in this regard;

14. *Expresses its readiness* to consider the recommendations referred n paragraph 13 above in accordance with its responsibilities under Charter of the United Nations;

15. *Requests* all Member States, relevant international bodies and anizations and all regional and subregional organizations to consider, appropriate, the application of the measures contained in this lution to regions other than Africa;

16. *Decides* to remain seized of the matter.

## 10. Illicit arms flows*

*Security Council,*

*Reaffirming* its resolutions 1170 (1998) of 28 may 1998, 1196 (1998) 6 September 1998 and 1197 (1998) of 17 September 1998,

*Recalling* the statements of its President of 25 September 1997 (S/ T/1997/46), 16 September 1998 (S/PRST/1998/28) and 24 tember 1998 (S/PRST/1998/29),

*Having considered* the recommendations contained in the report of Secretary-General of 13 April 1998 on "The causes of conflict and

* *Source*: UN DOC S/RES/1209 of 19 November 1999 adopted unanimously at its 3945th meeting

the promotion of durable peace and sustainable development in A
regarding the importance of stemming the illicit arms flows to
Africa,

*Recognizing* the close relationship of the problem of illicit arms
to and in Africa with international peace and security,

*Recognizing* with concern that commercial and political motive
an unduly important role in the illicit transfer and accumulation of
arms in Africa,

*Stressing* the close linkage between international peace and se
and sustainable development and the need for the interna
community to respond to the challenge of illicit arms flows to a
Africa in a comprehensive manner, encompassing not only the fi
security but that of social and economic development,

*Reaffirming* the right of African States to procure or pr
necessary weapons to meet their legitimate national security and
order needs in accordance with the Charter of the United Nation
other rules and principles of international law,

*Welcoming* an offer of the Government of Swizerland to ho
Geneva, not later than 2001, an international conference on the
arms trade in all its aspects,

*Welcoming* the negotiation process in Vienna on the elaborati
an international convention against transnational organized c
including a protocol to combat illicit manufacturing of and traffi
in firearms,

*Welcoming* the ongoing work of the Secretary-General on small
and light weapons pursuant to General Assembly resolutions 50/
and 52/38 J, including the work of the group of governmental ex
nominated by him, and *noting* the findings pertaining to illicit
flows to and in Africa in the Report on Small Arms of the Secre
General of 27 August 1997 (A/52/298),

*Welcoming* also the decision of the Secretary-General to coord
all action on small arms within the United Nations system throug
Coordinating Action on Small Arms, for which the Departme
Disarmament Affairs is designated as the focal point,

*Commending* the national, bilateral and subregional initiatives
taken in Africa in combating illicit arms flows, such as those that
been taken in Mali and Mozambique, the Economic Community of
African states (ECOWAS) and the Southern African Develop
Community,

*Welcoming* also the decision by the Orgnization of African Unity to pare a situation report on Africa containing detailed information on magnitude of the problem of small arms proliferation as well as ropriate policy recommendations,

1. *Expresses* its grave concern at the destabilizing effect of illicit ns flows, in particular of small arms, to and in Africa and at their essive accumulation and circulation, which threaten national, ional and international security and have serious consequences for elopment and for the humanitarian situation in the continent;

2. *Encourages* African States to enact legislation on the domestic ssession and use of arms, including the establishment of national al and judicial mechanisms for the effective implementation of such s, and to implement effective import, export and re-export controls, d *encourages also* the international community, in consultation with rican States, to assist in these efforts;

3. *Stresses* the importance of all Member States, and in particular ates involved in manufacturing or marketing of weapons, restricting ns transfers which could provoke or prolong armed conflicts or gravate existing tensions or conflicts in Africa, such as through luntary moratoria;

4. *Encourages* African States to participate in the United Nations gister of Conventional Arms, *encourages also* the establishment of propriate regional or subregional registers of conventional arms on basis of agreement reached by African States concerned, and *courages further* Member States to explore other appropriate ways enhance transparency of arms transfers to and in Africa;

5. *Urges* Member States with relevant expertise to cooperate with rican States to strengthen their capacity to combat illicit arms flows, luding through the tracking and interdiction of illicit arms transfers;

6. *Welcomes* the declaration on the moratorium adopted by the nference of Heads of State and Government of ECOWAS, adopted Abuja on 30 October 1998, and *urges* other subregional organizations Africa to consider taking similar measures;

7. *Ecourages* African States to examine the efforts undertaken in ner regions such as by the Organization of American States and the ropean Union in preventing and combating illicit arms flows, and to nsider adopting similar measures as appropriate;

8. *Welcomes* the intention of the Secretary-General to accord high ority to the United Nations role in promoting better understanding of direct and indirect consequences of illicit arms flows, and *stresses*

the importance of bringing the negative impacts of illicit arms and in Africa to the widest possible public attention;

9. *Encourages* the Secretary-General to explore means of ide international arms dealers acting in contravention of national le or embargoes established by the United Nations on arms tran and in Africa;

10. *Encourages* the Secretary-General to promote cooperation Member States, the United Nations, regional and subr organizations and other relevant organizations to collect, revi share information on combating illicit arms flows, especially re small arms, and to make available, as appropriate, informatio the nature and general scope of the international illicit arms tra and in Africa;

11. *Reiterates* the obligation of all Member States to ca decisions of the Council on arms embargoes, and, in this context the broader implications of the findings and experience International Commission of Inquiry established by its resolutio (1995) of 7 September 1995 and reactivated in accordance w resolution 1161 (1998) of 9 April 1998, and *requests* the Sec General to consider the possible application of such a measure to conflict zones in Africa with specific emphasis on the sources o arms and, if appropriate, make recommendations to the Council

12. *Encourages* the Secretary-General, in consolation with M States, to explore means for collection, sharing and dissemina information, including technical information, on illicit small arms and their destabilizing effects, in order to improve the interna community's ability to prevent the exacerbation of armed co and humanitarian crisis, as well as means for the rapid excha data on possible violations of arms embargoes;

13. *Requests* the Secretary-General to consider practical w work with African States in implementing national, regio subregional programmes for voluntary weapons collection, dispos destruction, including the possibility of the establishment of a f support such programmes;

14. *Recognizes* the important contribution of programm voluntary weapons collection, disposal and destruction in specifi conflict situations in Africa, and *expresses* its intention to co including, as appropriate, means to facilitate the successful cond such programmes in the mandates of future peacekeeping operat authorizes in Africa on the basis of recommendations by the Sec General;

15. *Calls upon* regional and subregional organizations in Africa to rengthen efforts to establish mechanisms and regional networks among levant authorities of their Members States for information sharing to ombat the illicit circulation of and trafficking in small arms.

16. *Decides* to remain seized of the matter.

# B. SELECT PRESIDENTIAL STATEMENTS OF THE UN SECURITY COUNCIL, 1998.

## 1. Involvement of children in armed conflict*

The Security Council expresses its grave concern at the harn impact of armed conflict on children.

The Security Council strongly condemns the targeting of child in armed conflicts, including their humiliation, brutalization, sex abuse, abduction and forced displacement, as well as their recruitm and use in hostilities in violation of international law, and calls upon parties concerned to put an end to such activities.

The Security Council calls upon all parties concerned to com strictly with their obligations under international law, in particular th obligations under the Geneva Conventions of 1949, the Additio Protocols of 1977 and the United Nations Convention on the rights the Child of 1989. The Council stresses the obligation of all States prosecute those responsible for grave breaches of internatio humanitarian law.

The Security Council recognizes the importance of the mandate the Special Representative of the Secretary-General on Children a Armed Conflict, supports his activities and welcomes his cooperati with all relevant programmes, funds and agencies of the United Natio system which he deems appropriate.

The Security Council expresses its intention to pay serious attenti to the situation of children affected by armed conflicts and, to this en to maintain contact, as appropriate, with the Special Representative the Secreatry-General and with the relevant programmes, funds a agencies of the United Nations system.

The Security Council, while dealing with situations of armed confli expresses its readiness to consider, when appropriate, means to ass with the effective provision and protection of humanitarian aid a assistance to civilian population in distress, in particular women a children; to consider appropriate responses whenever buildings or sit that usually have a significant presence of children such as, *inter al* schools, playgrounds, hospitals, are specifically targeted; to suppo efforts aimed at obtaining commitments to put to an end the recruitme and use of children in armed conflicts in violution of international la to give special consideration to the disarmament and demobilization

* *Source* : UN DOC 5 / PRST/1998/18 of 29 June1998 at its 3897th meeting.

ild soldiers, and to the reintegration into society of children maimed otherwise traumatized as a result of an armed conflict; and to support promote child-focused mine clearance and mine-awareness ogrammes, as well as child-centred physical and social rehabilitation ogrammes.

The Security Council recognizes the importance of special training personnel involved in peacemaking, peacekeeping and peace-iilding activities on the needs, interests and rights of children, as well on their treatment and protection.

The Security Council further recognizes that, whenever measures e adopted under Article 41 of the United Nations Charter, consideration iould be given to their impact on the civilian population, bearing in ind the needs of children,. in order to consider appropriate imanitarian exemptions.

## 2. Protection for humanitarian assistance*

The Security Council recalls the statement of its President of 19 ine 1997 (S/PRST/1997/34) concerning protection for humanitarian ssistance to refugees and others in conflict situations.

The Security Council welcomes the report of the Secretary-General n Protection for Humanitarian Assistance to Refugees and Others in onflict situations (S/1998/883) and notes the recommendations ontained therein.

The Security Council notes that several of the recommendations ontained in the report coincide with recommendations made in the eport 'The causes of conflict and the promotion of durable peace and istainable development in Africa' (S/1998/318).

The Security Council reaffirms the importance of pursuing a oordinated and comprehensive approach, in accordance with the urposes and principles of the Charter of the United Nations and rinciples and provisions of international law, in improving protection or humanitarian assistance to refugees and others in conflict situations.

The Security Council condemns the attacks or use of force in conflict tuations against refugees and other civilians, in violation of the relevant iles of international law, including those of international humanitarian iw.

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*Source*: UN DOC S/PRST/1998/30 of 29 September 1998 at its 3933rd meeting.

The Security Council likewise condemns all attacks or use of against United Nations and other personnel associated with U Nations operations as well as personnel of humanitarian orgniza in violation of international law, including international humani law. In this context, the Council recalls the statement by its Presid 12 March 1997 (S/PRST/1997/13) as well as other relevant state and decisions. It also recalls the Convention on the Safety of U Nations and Associated Pesonnel adopted by the General Assemb 9 December 1994.

The Security Council affirms its intention to review thoroughl promptly the recommendations of the Secretary-General with a vi taking steps consistent with its responsibilities under the Charter c United Nations and, in this context, notes the views expressed i debate on the matter at its 3932nd meeting on 29 September 199

## 3. Regional arrangements in maintenance of peace*

The Security Council recalls the report of the Secretary-Gener 13 April 1998 on 'the causes of conflict and the promotion of du peace and sustainable development in Africa' (S/1998/318). V reaffirming its primary responsibility under the Charter of the U Nations for the maintenance of international peace and securit underlines the increasingly important role of regional arrangement agencies, and of coalitions of Member States in the conduct of act in this field. The Council reaffirms that all such activity taken u regional arrangements or by regional agencies, including enforce action, shall be carried out in accordance with Articles 52, 53 and Chapter VIII of the Charter of the United Nations. It also underline importance of all such activity being guided by the principle sovereignty, political independence and territorial integrity of all St and by the operational principles for United Nations peacekee operations set out in the statement of its President of 28 May 199 25859).

The Security Council welcomes the views expressed by Secretary-General in paragraphs 42 to 44 of his report, in particul they relate to Africa. It recognizes that the authorization by the Co of action by regional or subregional organizations, or by Member s or coalitions of States, can be one tyupe of effective response to co

* *Source*: UN DOC S/PRST/1998/35 of 30 November 1998 at its 3950th me

situations, and commends Member States and regional and subregional organizations which have undertaken efforts and initiatives towards the maintenance of peace and security. In order to enhance its ability to monitor any activities that it has authorized, the Council expresses its readiness to examine appropriate measures whenever such an authorization is being considered.

In this regard, the Security Council note that there is a wide variety of arrangements and relationship which have developed in different instances of cooperation between the United Nations, Member States and regional and subregional organizations in the maintenance of peace and security, and that monitoring requirements will vary and should be tailored according to the specifics of the operations in question, including in relation to ongoing peace efforts. But in general operations should have a clear mandate, including a statement of objectives, rules of engagement, a well-developed plan of action, a time-frame for disengagement, and arrangements for regular reporting to the Council. The Council affirms that a high standard of conduct is essential for successful operations, and recalls the role of the United Nations in setting general standards of peacekeeping. The Council stresses that missions and operations must ensure that their personnel respect and observe international law, including humanitarian, human rights and refugee law.

The Security Council is also of the view that, where necessary or desirable, monitoring of such activities could also be enhanced by the inclusion of certain civilian elements, for instance dealing with political and human rights issues, within missions and operations. In this context, the Security Council also recognizes that the attachment of a United Nations liaison officer or team could improve the flow of information between the Council and those engaged in the conduct of an operation authorized by it but carried out by a coalition of Member States or regional or subregional organization. It expresses its readiness to consider, in consultation with the Member States and regional or suregional organization concerned, the deployment of liaison officers to such operations, on the basis of recommendations by the Secretary-General and as proposed in paragraph 8 of its resolution 1197 (1998) of 18 September 1998. In the case of operations conducted by regional or subregional organizations, the Council also expresses its readiness to consider, in consultation with the regional or subregional organization concerned, whether the deployment of liaison officers at the headquarters of the organization would be valuable.

The Security Council also underlines that the monitoring of such operations could be enhanced by the improved flow and exchange of

information, *inter alia*, through regular submission of reports, a the case of the Inter-African Mission to Monitor the Implementa of the Bangui Agreements in the Central African Republic, and thro the holding of regular briefing meetings between its Member regional and subregional organizations and Member States conduc such operations, and troop contributors and other participating Mem States.

The Security Council shares the view of the Secretary-General one possible means of monitoring activities of forces authorized by while also contributing to the broader aspects of a peace process through co-deployment of United Nations observers and other person together with an operation carried out by regional or subregio organization or by a coalition of Member States. The Council agr with the Secretary-General that, while such collaboration is applicable in all cases, co-deployment can make an import contribution to peacekeeping efforts, as in the cases of Lberia and Sie Leone where United Nations observe missions have been deploy alongside the Monitoring Group of the economic Community of W African States.

The Security Council underlines the importance, whenever United Nations deploys forces alongside forces of regional subregional organizations or Member States, of establishing a cl framework for cooperation and coordination between the Unit Nations and the regional or subregional organization or coalition Member States concerned. Such a framework should inclu specifying objectives, the careful delineation of the respective ro and responsibilities of the United Nations and the regional subregional organization or coalition concerned and of the areas interaction of forces, and clear provisions regarding the safety a security of personnel. The Council also stresses the importance ensuring that United Nations missions maintain their identity a autonomy with regard to operational command and control a logistics.

The Security Council urges Member States and regional a subregional organizatins to ensure the Council is kept fully inform of their activities for the maintenance of peace and security. T Council undertakes to consult regularly with Member States a regional and subregional organizations involved in such activities facilitate this.

## 4. Possible establishment of post-conflict peace-building structures*

The Security Council recalls the open debate held at its 3954th eeting on 16 December 1998 and on 23 December 1998 on "The laintenance of Peace and Security and Post-Conflict Peace-building". recalls also the report of the Secretary-General of 13 April 1998 on The causes of conflict and the promotion of durable peace and ıstainable development in Africa", which was submitted to the Security ouncil (S/1998/318) and to the General Assembly (A/52/871), as well s the report of the Secretary-General of 27 August 1998 on the Work f the Organization submitted to the fifty-third General Assembly (A/3/1). In this context, it welcomes the recommendations of the Secretary-ieneral concerning the role of the Security Council in the aftermath of onflict, in particular in ensuring a smooth transition from peacekeeping o post conflict peace-building. The Council recalls further the statement f its President (S/52696) of 30 April 1993 on the Secretary-General's eport entitled "An Agenda for Peace", including the subject of post-onflict peace-building.

The Security Council reaffirms its primary responsibility under the Charter of the United Nations for the maintenance of international peace ind security. It stresses the need to prevent the resurgence or escalation of conflict. The Council recognizes the importance of the post-conflict eace-building efforts of the United Nations to this end in all regions of he world and with due involvement of all United Nations bodies. In articular, it welcomes the role played by the Secretary-General in this ield. It recognizes the timeliness of exploring further means to prevent ind settle conflicts based on the Charter of the United Nations and enerally recognized principles of peacekeeping, and which would ncorporate post-conflict peace-building as an important component.

The Security Council recalls the statement of its President (S/PRST/998/29) of 24 September 1998, which affirmed that the quest for peace n Africa requires a comprehensive, concerted and determined approach, ncompassing the eradication of poverty, the promotion of democracy, ustainable development and respect for human rights, as well as conflict revention and resolution, including peacekeeping, and humanitarian ssistance. The Council underlines that efforts to ensure lasting solutions o conflicts require sustained political will and a long-term approach in he decision-making of the United Nations, including by the Council tself. It affirms its commitment to the principles of the political

* *Source*: UN DOC S/PRST/1998/38 of 29 December 1998 at its 3961st meeting.

independence, sovereignty and territorial integrity of all State conducting peace-building activities, and the need for States to co with their obligations under the Charter of the United Nations an principles of international law.

The Security Council underlines that economic rehabilitation reconstruction often constitute the major tasks facing societies emer from conflict and that significant international assistance beco indispensable to promote sustainable development in such cases that context, it recalls that Article 65 of the Charter of the United Nat provides that the Economic and Social Council may furnish informa to the Security Council and shall assist the Security Council upo request.

The Security Council, conscious of the emphasis placed by Secretary-General on the issue of post-conflict peace-building particular in the context of the reform of the United Nations, encoura him to explore the possibility of establishing post-conflict peace-build structures as part of efforts by the United Nations system to achiev lasting peaceful solution to conflicts, including in order to ensur smooth transition from peacekeeping to peace-building and last peace.

The Security Council recognizes the value of including, appropriate, peace-building elements in the mandates of peacekeep operations. It agrees with the Secretary-General that relevant po conflict peace-building elements should be explicitly and clea indemnified and could be integrated into the mandates of peacekeep operations. It notes that peacekeeping operating may include milita police, humanitarian and other civilian components. It requests Secretary-General to make recommendations to the Council to this eff whenever appropriate.

The Security Council also requests the Secretary-General to ma recommendations to the appropriate United Nations bodies concern the transitional period to the post-conflict peace-building phase wh recommending the final drawdown of a peacekeeping operation.

The Security Council recognizes the need for close cooperation a dialogue between the bodies of the United Nations system, in particu those directly concerned in the field of post-conflict peace-building, accordance with their respective responsibilities and expresses willingness to consider ways to improve such cooperation. It a emphasizes the need to improve the exchange of information betwe all relevant actors in the field of post-conflict peace-building, includ United Nations agencies and bodies, international financial institutio

onal and subregional organizations, troop contributors and the donor munity. In this context, it notes with appreciation the Secretary-eral's plans for strategic frameworks to ensure increased coherence effectiveness in the entire range of United Nations activities in States nd recovering from crisis.

The Security Council will remain seized of the matter.

# BOOK REVIEWS

**1. S. Bhatt, V.S., Mani and V. B. Reddy (eds.), *Air Law and Poli* *India* (Lancers Books, New Delhi, 1994, Reprinted in 1997), pp. Price Rs. 600/-.**

**2. V.S. Mani, S Bhatt, and V.B. Reddy (eds.), *Recent Trend* *International Space Law and Policy* (Lancers Books, New Delhi, 19 pp. 683, Price Rs. 900/-.**

These two books together contain 54 essays covering diffe aspects of Air Law and Space Law and are contributed principally the scholars past and present of the International Law Divisio Jawaharlal Nehru University (JNU). They are, in turn, edited by J scholars who incidentally contributed the largest number of essays any three contributors of the compendia. This has, unfortunat affected the end-product in that one finds the more of the same thin some of the contributions by these three editors. This is particularly case with Chapters 1,4,18 and 24 of Air Law and Chapters 8,10 22 38 of Space Law.

I realise that works of this kind suffer from un-evenness and inte unity. But this deficiency could have been avoided by firm guida from the editors as to the organisation, structure and direction of contributions.

Thirdly, somewhat to the dismay of the present reviewer, some the essays appear to be hortatory in their presentations rather than be incisive legal analyses and interpretations.

Fourthly, there is no doubt included in these works are some ess of practical and administrative nature. While I undoubtedly welco the inter-disciplinary presentation, I would have liked to see a real cro fertilisation of ideas which I found wanting in these works. I do real that this is far more easily said than done! However, the editors co have made pointed effort in achieving a purposive and meaningful mu disciplinary approach to the subjects of study. The reviewer regr that he could not engage himself in a detailed review of the essays. that as it may, there is matter-of-fact information in some of the ess which the "generalists" might find useful. The piece on "India a Bilateral Air Services Agreement" by M.R. Shivaraman and Risal Si and the piece by G.S. Sachdeva on "The Relevance of Consu Protection Act to Claims Concerning Carriage by Air Act" illustrate point of view in this regard. Both these examples are taken from book on Air Law. Some of the essays contained in it, however, app

be mystifying. The piece on "Space in Ancient Law" from the erudite n of VS Mani at P.17 of the Space Law book, is a case in point. Not ing a physicist I am not in a position to demonstrate that it is the ysical laws of science than supernatural theories that underlie a true planation of creation. But readers of Stephen Hawking on *A Brief story of Time* might find Mani's Chapter rather enigmatic.

Every Indian academic would find these books most useful for the xts included in the appendices. It is to be regretted, though, that the ference to conventions and agreements is not always mentioned.

Despite the criticisms above, the efforts of the scholars of the ternational Law Division of JNU and others deserve our appreciation. deed the editors have placed the Indian academics and lawyers under serious debt of gratitude by these publications even if they have failed reach the standard of some of the classics in the field of Air and ace Law.

M. K. NAWAZ*

Of the Editorial Board. This was the last piece contributed by Professor Nawaz to *IJIL* before he expired on 31 December 1998.

**S. Shiva Ramu,** ***Franchising (Wheeler Publishing, New Delhi,*** ***pp. 152, Price Rs. 90/-.***

**India International Law Foundation,** ***Franching-Legal Busine*** ***Social Issues*** **(Siba Exim Pvt. Ltd., Delhi, 1997), pp. vi** **Price Rs. 450/- (India) & US $45 (Abroad).**

**Mark Abell & Lisa Sen,** ***Franchising in India*** **(Eastern Law** **Calcutta, 1998), pp. 30+352, Price Rs. 350/-.**

Franchising as a new contractual modality for expanding estat businesses nationally or internationally has gained worl acceptance. The franchising arrangement consists in an agre between two independent entities (national or international) wh the franchisor in consideration of an entry free and/or royalty the franchisee the right to market goods or supply services usi franchisor's trademark and methodology. The franchisor provid necessary knowhow and training for the purpose.

The advantage of franchising arrangements to the franchisee i without making large capital investment he can benefit from a known trademark and thereby have a ready clientele, can obtain tr in the franchisor's business methods and save on advertisement and get assistance in case of difficulties as part of the package franchisor, on the other hand, is able to expand his business in areas over a relatively short period of time without making full investment in the franchisee's territory.

Franchising had its origin in the USA after the Second Worl and subsequently spread to Canada and Western Europe. In recent it has been used as a vehicle for investment and privatisation in E Europe and is now assuming importance in the economies o developing countries which are opening up their markets.

With India liberalising its economy, franchising has made its in this country albeit in a few sectors, but there are already proje about its rapid growth in the near feature. The Indian business and community will, therefore, need to become familiar with the intric and legal techniques of the franchisor-franchisee relationshi address the ethnic, social and cultural issues that may arise from relationships in order to benefit fully from the franchising arranger The three books under review represent the first step in the directi educating the Indian business and legal community in the techniq franchising and to provide an insight in the various issues inv therein.

S. Shiva Ramu's book on *Franchising* is divided into three parts. A sketches the historical evolution of the concept of franchising. pter 1 describes the nature and growth of franchising. Chapter 2 idates the concepts behind the franchising system. Part B is devoted he franchising operation. Chapter 3 describes the advantages and dvantages of franchising with respect to both the franchisor and chisee as well as the franchisor-franchisee relationship. Chapter 4 the preparatory processes necessary for the establishment of a ness-format franchising, selection of the franchisee and the legal ects involved therein.

Part C profiles major franchisors in the areas of food and restaurants apter 5); hospitability & real estate (Chapter 6); Services (Chapter and Retailing (Chapter 8). Finally, the book reproduces the specimen y of the Franchise Agreement entered into by the Bata Shoe Co. its franchisees.

The second book entitled *Franchising — Legal, Business & Social es* is a compendium of the papers presented at the International ninar on Franchising as a Tool for Development organised by the ia International Law Foundation in collaboration with UNIDROIT New Delhi on 28-29 March 1996. The presentations made are grouped er eight sections. Section I entitled "Franchising — An Overview" out the presentations made by G.V. Ramakrishna, Chairman of the investment Commission; Lena Peters, Research Officer, UNIDROIT, has provided a most comprehensive overview of franchising ldwide'; Mark Abell, Head, Franchising & Licensing Group, Field ner Waterhouse, London; Dr. Istvsan Kiss, Secretary-General, ngarian Franchising Association: Dr. S. Radhakrishna, Associate fessor, Indian Institute of Foreign Trade; Raj Prakash, Clifford nce; A.K. Dave, Quality Inns India Pvt. Ltd; and J.B. Dadachanji, vocate & Solicitor. Section II entitled "Franchising & Intellectual perty Rights" sets out presentations made by Prof. V. Ramachandriah, ian Institute of Foreign Trade and Dr. S. Chakravarthy, Member, nopolies & Restrictive Trade practices Commission. Section III tled "Franchising & Labour Laws" has a presentation by G.B. Pai, ior Advocate, Supreme Court of India. Section IV entitled anchising & Taxation Laws" has a paper presented by Dr. V. Gauri nkar, Advocate, Supreme Court of India. Section V entitled anchising and Consumer Protection" has papers presented by P.V. our and J. Vellapally, Senior Advocates, Supreme Court of India. ally Section VII entitled "Applicable Law & Settlement of Disputes" papers by Rahul P. Dave Advocate and Barrister Lisa Sen.

Since the legal issues relating to franchising today touch upon branch of business law, and more particularly encompass the a IPRs, non-patented know-how, transfer of technology, competitio taxation issues, leasing of equipment, investment and financi outlets, product liability and insurance as well as dispute reso procedures, the papers included in this book provide an insight in difficulties and the ticklish issues foreign franchisors may have t under the existing legal framework in India.

The third book "Franchising India" by Mark Abell and Lis contains a most comprehensive treatment of the subject of franc in India in all its conceivable dimensions. The book is unique not in the sense of providing an in-depth profile on the subject of franc in India, but also because structurally and substantively it would as a handy guide or manual to the Indian business and legal comm interested in franchise arrangements. Further, the book not only ex the basic commercial rationale of franchising and the various for can take, its also explains the complex legal documentation that have to be prepared for concluding franchise arrangements and Indian law impacts on it.

The book is divided into eight sections. Section One ent 'Introduction' provides a comprehensive introduction to the t Chapter 1 explains the concept of franchising and outlines its histo evolution and growth. Chapter 2 deals with the relevance of fo franchises to India, the key attractions being lower capital require geographical extent of the country, cultural empathy and harne local market knowledge. Chapter 3 addresses itself to the question, a franchise can be developed. Chapter 4 concerns itself with valu franchise. Chapter 5 deals with the various permissions require franchisors seeking to do business in India.

Section Two is devoted to the basic legal issues involve establishing a franchise in India. Chapter 1 deals with the impa competition law on franchises in India. Chapter 2 is concerned wit impact of intellectual property laws in India. Chapter 3 deals wit consumer protection laws *vis-a-vis* franchises in India. Chapter addressed to the labour laws in relation to franchises. Chapter 5 with the insolvency laws in relation to franchises.

Section Three contains a description of the various kind documentation that would need to be prepared in connection w franchise arrangement.

Section Four is devoted to the tax aspects involved in a fran transaction. Section Five is devoted to the dispute settlement proce

at may be employed to solve a franchising dispute. Section Six deals ith the termination of a franchise. Section Seven is concerned with the gulation of franchises in India in the light of such regulation in USA, ance and Australia. While the authors are of the view that "the need India is not to complicate franchising by confused misdirectedly gislation such as that found in Indonesia or Russia for example but to tablish ethical standards of conduct which are supported by the anchisees operating in India", a new legislation improving the legal nvironment for the growth of franchises in India or at least an nendment to the existing MRTP Act appears to be necessary because is Act considers the giving of exclusitivity to any particular licensee imposing geographical limitations on the exercise of a licence as an nfair trade practice. Section Eight appends models of a Master Franchise greement, an International Distribution Developer Agreement, a Unit ranchise Agreement and Franchisees's Application Form.

The last book is particularly recommended for all potential anchisors and franchisees interested in establishing franchise outlets India. It would also be a handy tool in the hands of legal advisers iving counsel on franchising matters.

D.S. MOHIL*

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Of the Editorial Board.

**M.B. Rao, *Taxation of Foreign Income: India's Double* *Treaties* (Vikas Publishing House Private Ltd., New De 1997), pp. 1001 and i-xvii, Price Rs. 1200, library catalo ISBN 0-0431 - X.**

Income Tax is a major adjunct of Government revenue the wo over. There are two main principles that underlie the jurisdictional b of taxation — the source or *situs* principle and the residence or fis domicile principle. Almost all states tax on the basis of source princi and so does India. But this tends to encourage nationals to invest abr thus causing flight of capital, so badly needed for domestic investme and hence prejudicial to the interests of developing countries. T residence principle is adopted by a few countries, mostly develop whole residents have large foreign interests. There is however a modifi principle called nationality. This combines the effects of source a residence both. The USA, Mexico and Phillipines have adopted t basis and their citizens, wherever resident, are taxed on their worl wide income. While non-residents and foreign corporations are tax solely on income derived from the source country by virtue of residen The conflict of double taxation becomes obvious from the abo analysis.

In an era of globalisation and multinationals, double taxation appea as unavoidable as its avoidance is necessary to provide fillip international investments, multinational entrepreneurship, transfer technology, trans-country use of trade marks and patented processe growth of franchises and development of world trade. It is quite ea to see a valid reason and understand the clamour for natural justi from the point of view of non-residents and multinational corporatio whose incomes tend to get taxed in the country of source and th again in the country of residence or nationality. On the other hand bo countries have their unimpeachable logic for taxation yet the cumulati effect of double taxation on corporate enterprise is negative and advers It also acts as a deterrent on the free flow of capital, goods and servic over a period of time.

The consequences of this prohibitive burden of international doub taxation and the conflictive nature of tax law systems in differe countries were realised pretty early in the twentieth century. The Leag of Nations was seized of this problem and a Model Bilateral T Convention was adopted in 1928. It formulated the concept "permanent establishment" which though soon lost relevance due changing scenario of international trade and investment. Second Wor War intervened and then under the aegis of the UN, extensive discussi

ere held and several drafts were revised till adoption of the UN model onvention by the Economics and Social Council. The U.N laid down he guidelines for international co-operation against the evasion and voidance of taxes. These guidelines have been widely accepted and ndia has entered into over 50 agreements with various countries to void double taxation in order to attract investments and trade. Some of he agreements are really expansive while others are merely functional.

This book is a comprehensive study in double taxation and its first 0 pages provide a historical perspective to double taxation, the volution of model treaties by OECD and the UN, an analytical treatise nd a comparison of the treaty clauses with particular reference to Indian ax laws. Another about 80 pages contain detailed commentaries on the ouble taxation avoidance agreements with selected 19 countries, which re informative as well as cautionary of the pitfalls in some treaties. A najor asset of this book is a compilation of the texts of Double Taxation Avoidance Agreements concluded by India with 50 countries which over almost 800 pages. This makes it as excellent reference book to ource information on this topical subject which is growing in importance nd relevance.

This study also traces the provisions of Indian tax laws which tipulate taxation of Indian residents both on their domestic and foreign ncome. Tax is also levied on non-resident Indians (NRIs) and foreigners on their Indian income. This creates an anomaly of double taxation, irst by India and then by the country of residence of the non-resident or the foreigners. This is irksome and counter-productive in the context of economic globalisation. The agreements on the avoidance of double axation act as relief and have compensatory effect.

The author is a great scholar of international economic laws and has undertaken extensive research in India and abroad. He has been a member of several Indian delegations and has had an assignment as a ax law expert for the UN in Trinidad and Tobago. He was also a member of the Law Commission of India.

This book will prove to be a good reference for treaties and provide material of historical information to researchers, practitioners and tudents in the field of international taxation. NRI's and MNC's will lso find it eminently useful.

G.S. SACHDEVA*

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* Of the Editorial Board.

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I, Rahmatullah Khan, hereby declare that the particulars given above ar to the best of my knowledge and belief.

*Sd/-* Rahmatullah

# HE RIGHT TO CONSULAR ASSISTANCE AS A BASIC HUMAN RIGHT OF ALIENS—A REVIEW OF THE ICJ ORDER DATED 3 MARCH 1999

V.S. Mani*

## I. INTRODUCTION

The recent Provisional Measures Order issued by the International urt of Justice in the *Case Concerning the Vienna Convention on Consular ations*[1] between Germany and the United States is a path-breaking icial. decision. The case is important in several respects. First, for the t time the Court in this case faces head on the issue of the right of an alien seek consular assistance from his national state.[2] Second, the case has earing upon the implications of municipal law doctrines such as the ocedural default", well known in Anglo-American law, for the plementation of international law. Third, it highlights the complex intra-leral-state relations and the complexities of ensuring compliance with ernational obligations at the level of the constituent units of a federal te, such as the United States. Fourth, it offers an opportunity for the ernational Court to play a human rights friendly role even while seeking npliance with what are essentially treaty obligations. Finally, the case o reveals the divergencies of human rights standards in the domestic ctices of two of the most developed countries, namely the United States d Germany.

## II. THE CASE

On 3 March 1999, the International Court of Justice handed down a animous Order on a German request for indication of provisional asures, asking the United States (a) to "take all measures at its disposal ensure that Walter LaGrand (a German national) is not executed pending

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Professor. International Legal Studies. Jawaharlal Nehru University. New Delhi.

ICJ Order dated 3 March 1999. *Source* : Mimeographed reproduction of the Court's Order, reprinted in this *Journal* pp. 111-124.

In 1998, the Court received a complaint (3 April 1998) from Paraguay alleging violations of the Vienna Convention on Consular Relations, 1963, in respect of Argel Francisco Brenard, a Paraguayan national convicted of murder in Virginia, USA whose execution had been scheduled for 14 April 1998 and who was eventually executed on that date. Although in October 1998, Paraguay had submitted its Memorial, in November it requested the Court to discontinue the proceeding(s) to which the United States agreed. By an Order of 10 November 1998, the Court removed the case from its List See *ICJ Communiquè* No 98/36 of 11 November 1998

final decision" in the case and to "inform the Court of all the mea which it has taken in implementation of this Order", and (b) to "tra this Order to the Governor of the State of Arizona".[3]

Germany instituted proceedings against the United States for "viola of the Vienna Convention on Consular Relations" of 1963 at 7.30 p. 2 March 1999. The alleged violation of the Vienna Convention took according to Germany, in the criminal proceedings held in the Sta Arizona, USA since 1982 against two brothers of German nationality, and Walter LaGrand, on charges of murder, with the procee culminating in sentencing the prisoners to death.

According to Germany, the trial and sentencing of the two Ge nationals took place in the Arizona courts, denying them their rig consular assistance—the German nationals had, pursuant to Article 36( of the Vienna Convention, a right to be advised "without delay" of right to consular assistance. This denial of their right also preclu Germany from exercising its rights to protect the interests of its natio in the United States, pursuant to Articles 5 and 36 of the Vienna Convent Germany further alleged. By the time the issue of the right to cons assistance was raised before the Federal Court of First Instance by LaGrand brothers, this time with the assistance of the German cons officers, it was too late. The US Court applied the municipal law doct of "procedural default" (that the prisoners ought to have, but had raised such an issue before the trial court). This was reaffirmed by appellate court of the last resort. Karl LaGrand was executed. Wa LaGrand was awaiting his execution on 3 March 1999, as Germ approached the International Court in the evening of 2 March 1999.

Germany has asked the International Court to adjudge and declare t

1. The United States has violated its international obligations it o to Germany, under Articles 5 and 35 of the Vienna Conventi
2. Germany is therefore entitled to reparation;
3. The United States has an international obligation not to ap domestic law doctrines (such as "procedural default") which wo preclude the exercise of rights under Article 36 of the Conventi
4. The US is under an international obligation to carry out the ab international obligations in respect of any German national in future;
5. The criminal liability imposed on the LaGrand brothers in violat of international obligations is void and must be so recognised the United States authorities;

3. Para 29 of the Order, note 1.

6. The United States should make reparation, "in the form of compensation and satisfaction" for the execution of Karl LaGrand;
7. The United States should restore *status quo ante* in respect of Walter LaGrand; and
8. The United States should guarantee to Germany non-repetition of such illegal acts.

Along with its application instituting proceedings before the ernational Court, Germany also submitted "an urgent request" for lication of provisional measures. This request, *inter alia*, pointed out at despite several appeals for clemency and numerous diplomatic erventions by Germany, even "at the highest level," Karl LaGrand was ecuted on 24 February 1999, and that the execution of Walter LaGrand s scheduled for the very day subsequent to the date of request before the J. The German request further sought the Court to direct the US to "take measures at its disposal to ensure that Walter LaGrand is not executed nding the final decision in these proceedings, and it should inform the urt of all the measures which it has taken in implementation of that der".[4]

The Court noted that the German request also underscored the fact that e importance and sanctity of an individual human life are well established international law. As recognized by Article 6 of the International Covenant Civil and Political Rights, every human being has the inherent right to e and this right shall be protected."[5] Germany also argued that "Under exceptional circumstances of this case, and given the paramount interest Germany in the life and liberty of its nationals, provisional measures are gently needed..."[6]

Upon receipt of the German request for indication of provisional easures, Acting President Judge Weeramantry addressed a letter to the Government drawing the attention of that government "to the need to in such a way as to enable any Order the Court will make on the request provisional measures to have its appropriate effect."[7]

On the morning of 3 March 1999 the Acting President met the presentatives of both the parties. The German representative reported t the Governor of Arizona had rejected a recommendation by the State ercy Committee for a stay of execution of Walter LaGrand. He also urged Court to indicate forthwith provisional measures *suo moto* without lding any hearing, in view of the urgency of the case. The US

Para 9 of the Order, note 1.
Para 8, *ibid.*
*Id.*
Para 11, *ibid.*

representative, however, argued that the German move before the C was made "at a very late date" and that he would have strong object to a Court Order made *suo moto* without having first duly heard the Parties.[8]

The Court first of all concluded that it had "the jurisdiction neces to indicate the provisional measures required",[9] that there existed *pr facie* a dispute within the meaning of Article 1 of the Optional Protoco the Vienna Convention.[10]

With regard to its power to indicate provisional measures *suo m* pursuant to Article 75(1) of its Rules, the Court held (1) that such a po was recognized by the Court itself, as evidenced by the Rules of Co since 1936; (2) that it was immaterial that such a power had not b utilised by the Court so far; (3) that the Court could make use of this po regardless of whether or not it was seized of a request for indication provisional measures; (4) that in exercise of this power, the Court "may, the event of extreme urgency, proceed without holding oral hearings," a (5) that it was for the Court to decide, depending on the circumstances each case, whether or not to invoke its power to act *suo motu*.[11]

The Court also recounted other elements of the indication of provisio measures, such as the need to preserve the respective rights of part pending its final decision, and urgency of the provisional measures. particularly noted the impending "irreparable harm to the rights claimed Germany" if Walter LaGrand was allowed to be executed as scheduled

The Court also clarified that the issues before it did not concern t right of US federal states to impose death penalty as such. Nor was t Court acting as "a court of criminal appeal", as its role was mainly address itself to "international legal disputes between States, *inter al* when they arise out of the interpretation or application of internatio conventions."[13]

## III. COMMENTS

The case in general, and the Provisional Measures Order in particul call for a few comments, even though the proceedings are still pendi before the International Court. The comments relate to (*a*) the nature of t

8. Para 12, *ibid.*
9. Para 16, *ibid.*
10. Para 17, *ibid.*
11. Para 21, *ibid.*
12. Para 24, *ibid.*
13. Para 25, *ibid.*

ght to consular assistance, (*b*) the nature and binding effect of the ovisional Measures Order, and (*c*) some issues of state responsibility.

## A. The Right to Consular Assistance

### *Fundamental Character of the Consular Law*

The core of the German claims rests on the right of two German nationals consular assistance, an important part of the consular laws. The ternational rules of diplomatic and consular law have been described by e International Court as of "fundamental character", in the *American ostages* case.[14] The Court in that case condemned "the frequency with hich at the present time the principles of international law governing iplomatic and consular relations are set at naught by individuals or groups f individuals" as "already deplorable", but that case "is unique and of ery particular gravity" because of the involvement of the receiving state self. "Such events", said the Court, "cannot fail to undermine the edifice f law carefully constructed by mankind over a period of centuries, the aintenance of which is vital for the security and well being of the complex nternational community of the present day, to which it is more essential han ever that the rules developed to ensure the ordered progress of relations etween the members should be constantly and scrupulously respected."[15]

The Court's observations on the fundamental character of the diplomatic nd consular law apply with equal emphasis to the *LaGrand* case. If in the *merican Hostages* case both the human rights and the diplomatic/consular nviolability of the American hostages were at stake, in the present case the ights of the German nationals in custody of a receiving state as well as the ights and duties of the German consular mission, both specifically uaranteed by the conventional law are at stake, and a constituent authority f the receiving state appears to have committed their violations.

### *. Consular Protection of Foreign Nationals*

Article 5 of the Vienna Convention on Consular Relations 1963, *inter lia*, recognises the following consular functions in relation to protection f the nationals of the sending state:-

> "(a) protecting in the receiving State the interests of the sending State and of its nationals, both individuals, and bodies corporate, within the limits permitted by international law";

4. *US Diplomatic and Consular Staff in Tehran* case, *ICJ Reports 1980*, p. 3, at para 91.
5. *Ibid*, p. 3

"(e) helping and assisting nationals, both individuals and bodies corporate, of the sending State;"

"(f) safeguarding the interests of nationals, both individuals and bodies corporate, of the sending State in cases of succession *mortis causa* in the territory of the receiving State, in accordance with the laws and regulations of the receiving State;"

(h) safeguarding, within the limits of the laws of the receiving State, "the interests of minors and other persons lacking full capacity who are nationals of the sending State, particularly where any guardianship or trusteeship is required with respect to such persons;"

(i) subject to the practice and procedures obtaining in the receiving State, in assisting those nationals of the sending State who, "because of their absence or any other reason, are unable at the proper time to assume the defence of their rights and interests", before the tribunals and other authorities of the receiving State.

*3. Consular Communications in respect of Foreign Nationals*

Evidently, a consular mission may not be able to perform its functio as promptly as necessary for the protection of interests of nationals of t sending state, unless it is placed in such a position. Hence the importan of the freedom of communication between a foreign national and t consular mission representing his national state, and between the authoriti of the receiving state and the foreign consular mission in respect of a particular national of the sending state. This freedom of communicatio underscores the organic bond between a foreign national and his nation state (the sending state of the consular mission). Indeed, the latter has sacred duty to act as *parens patriae* towards its nationals, a duty whi states are bound to mutually respect.

Article 36 of the Vienna Convention embodies the rules relating consular communications.[16] As Luke T. Lee remarks-

At the crux of the issue were the duties of the receiving State to permit unimpeded communication between consuls and nationals of the sending State, to inform consuls of the imprisonment or

16. Luke T. Lee notes that "Eliminated altogether at the thirteenth plenary meeting of t Vienna Conference on Consular Relations, 1963 for the failure to obtain the requisi two-thirds majority, it was hastily restored in the eleventh hour of the Conferen and may be regarded as one of the most important contributions to consular law the Vienna Convention." Luke T. Lee, *Vienna Convention on Consular Relatio* (Leyden, 1966).

detention within their district of such nationals, and to allow consuls to visit them in prison, custody or detention. *These rights of consuls admittedly are basic to their protective functions*. Their absence from the text of the Vienna Convention would have left a void somewhat comparable to that of the Geneva Conferences of the Law of the Sea which failed to delimit the width of the territorial sea.[17]

The rights of consular communications, as embodied in Article 36 of ne Vienna Convention, emerged mainly against the Cold War background. ee cites two celebrated Cold War cases involving American nationals to lustrate the point.[18] In one case, Professor Frederick C. Barghoon, a Yale niversity authority on Soviet affairs, was arrested in Moscow in October 963 on charges of espionage, the US embassy was notified of it after some elay, but the US consular office was not granted access to Barghoon. The S Ambassador to Moscow protested the "unjustifiably long period of me between his [Barghoon's] arrest and notification of the Embassy." In ne second case, Francis Gary Powers, the pilot of the American U-2 spy lane shot down on 1 May 1960 in the Soviet Union, was arrested and kept n a Soviet prison, and the US officials were denied access to him for more nan two months. The Soviet conduct in both the cases contravened a 1933 oviet assurance to the United States on the right to be notified within three o seven days and the right of access "without delay."[19] Small wonder, the nited States delegation to the Vienna Conference on Consular Relations, 963, highlighted the importance of these consular rights.[20] Finally, at the nitiative of India, the Conference reconsidered the proposal on the consular ghts in respect of foreign nationals in the custody of a receiving State and dopted Article 36 of the Vienna Convention.[21]

Article 36 of the Vienna Convention encompasses three groups of ghts:

(a) The freedom of communication and access between consular officers and the nationals of their sending state;

(b) The freedom of a consular post to be notified of the arrest, custody or detention of a national of the sending state.

(c) The freedom of consular officers to visit the detained national, including the right of the latter to be advised of his right to consular

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7. *Id.*, emphasis supplied

8. *Ibid.*, p 108.

9. *Id.* The substance of these rights of notification and visitation was reaffirmed by Article 12 of the US-Soviet Consular Convention of 1964.

0. *Ibid*. p. 111

1. For the detailed drafting history of this provision see Lee, *ibid.*, pp. 109-114

assistance.

The above rights are to be exercised subject to the laws of the receivi state (which, however, "must enable full effect to be given to the purpo for which the rights accorded under this article are intended").

The critical provisions relevant to the *LaGrand* case are Article 361(1)( and (c):-

1. With a view to facilitating the exercise of consular functions relati to nationals of the sending State:

(*a*) .....

(*b*) If he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

(*c*) Consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention of the national in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

Evidently, the right of a detained foreign national to be advised of h right to consular assistance is larger and more important than other consul rights. It accords him a special human rights safeguard. An alien in foreign land, suddenly facing custodial authorities or criminal proceeding may be unfamiliar with the local laws and practices, and often the loc language. He ought to be properly apprised of his rights of fair trial availab under the local laws and fora. He should be given a special opportunity t gain confidence in the fairness of the legal system obtaining in the receivin state. The general rule of ignorance of law not being a valid excuse cann fairly apply to a foreigner with the same vehemence with which it does t local citizens, without granting him fair trial, as required in Article 36(1)(t and (c). Criminal justice should not only be done, but it should appear t be done. While the national treatment theory in respect of criminal justic

ystem would suggest that rules could not be changed and made more avourable to foreigners, the foreigners should be placed in actuality on a ooting equal to the local citizens and they should not be specially andicapped as against the local citizens, merely for the reason of their eing foreigners. The consular interposition will ensure equality of reatment for the foreigners. In this sense, the consular rights guaranteed n Article 36 of the Vienna Convention are of fundamental character. They epresent a necessary interface between the consular law and human rights. And, in view of their fundamental character, domestic procedural doctrines uch as the "procedural default" cannot stand in the way of the full exercise of those consular rights. This indeed is the thrust of Article 36(2). The right o liberty and security of person, enshrined in Article 9 and the right of fair rial under Article 14 of the International Covenant on Civil and Political Rights 1966 becomes nugatory, if the detained alien is not advised of his rights of fair trial. The right to consular assistance is, therefore, an inseparable part of the right of an alien to fair trial.

## B. Nature and Binding Effect to ICJ's Provisional Measure Order

### *1. The Nature of the Court's Provisional Measures Order*

The International Court is endowed with the power to issue provisional measures of protection, by virtue of Article 41 of its Statute.[22] The Court has invoked this power on several occasions during the pendency of a case in order to either protect and preserve the rights of parties and the material object of the dispute, and/or to prevent the aggravation of the dispute.

In the present case the Court exercised the power to indicate provisional measures in unique circumstances. As noted already, Walter LaGrand was scheduled to be executed on 3 March 1999. Germany moved the Court at 7.30 p.m. on 2 March. It pleaded with the Court that the matter required immediate action on the part of the Court not only because it had the duty to preserve the *status quo* of the rights of the Germany as they stood at the commencement of the proceedings, but also because of "the importance and sanctity of an individual human life" underscored by Article 6 of the International Covenant on Civil and Political Rights whereby every human being has the inherent right to life, "and this right shall be protected by law"[23]. Germany asked the Court to indicate to the United States that the latter "should take all measures at its disposal to ensure that Walter LaGrand

22. For a doctrinal analysis of the Court's power to issue provisional measures of protection, see generally, V.S. Mani, *International Adjudication: Procedural Aspects* (The Hague, 1980), pp. 276-309.

23. See ICJ Order, note 1, para 8 at p. 4

is not executed pending the final decision in these proceedings and should inform the Court of all the measures which it has taken implementation of that Order." It also asked the Court to consider its requ as a matter of great urgency "in view of the extreme gravity and immedia of the threat of execution of a German citizen."[24]

The Acting President of the Court, Judge Weeramantry, met t representatives of both parties at 9.00 a.m. on 3 March. Germany at th meeting advised the Acting President of the news of rejection by the Arizo Governor of a recommendation by the Mercy Committee to stay t execution of Walter LaGrand who was now to be executed at 3.00 (Phoen Time) that very day. It also reminded the Court of its powers to act *propr motu* in respect of indication of provisional measures *vide* Article 75 of i Rules, and requested that the Court exercise these powers without holdin any hearing, in view of the extreme urgency of the situation. The Unite States promptly objected to such an extraordinary proceeding withou having first heard the two Parties.[25]

The Court was convinced that it had such a power by virtue of Articl 75 of its Rules, that it could, "in the event of extreme urgency", procee without holding oral hearing," and that it should decide for itself th invocation of its *suo motu* power in each case, "in the light of the particula circumstances of the case."[26]

Thus the Court unanimously issued the provisional measures orde indicating that the United States should take all measures at its disposal t ensure that Walter LaGrand is not executed pending the final decision i these proceedings, and should inform the Court of all the measures whic it has taken in implementation of this Order", and that "The Governmen of the United States of America should transmit this Order to the Governo of the State of Arizona."[27]

However, the Court's Order was not complied with and Walter LaGran was executed.

Was the Court right in indicating the provisional measures of protectio as above in this case? Did the United States breach international law in no complying with the Court's Order?

On the first question, there were elements of dissent in the Court itself Judge Oda in his separate Declaration expressed his "great hesitation" a he voted with the Court order. His hesitation was based on a number o issues First, if "Walter LaGrand's rights as they relate to humanitaria

24. See para 9, *id*.
25. *Ibid*, p. 5, para 12.
26. *Ibid*, p. 6, para 21
27. *Ibid.*, p. 8, para 28

ues are to be respected then, in parallel, the matter of rights of victims violent crime (a point which has often been overlooked) should be taken o consideration".[28] Second, if consular contact had occurred at the time Walter LaGrand's arrest or deletion, the judicial procedure in the United tes domestic courts relating to his case would have been no different.[29] there was no *status quo ante* to be preserved. Third, provisional measures uld only be granted to preserve the rights of states exposed to imminent each, whereas in the case before the Court, no such rights of states (as tinct from the rights of individuals) were at stake for the Court to issue provisional measures which it did.[30] Fourth, "If the request in the esent case had not been granted, the Application [instituting the case] elf would have become meaningless."[31] Fifth, "If the Court intervene *ectly* in the fate of *an individual*, this would mean some departure from function of the principal judicial organ of the United Nations, which is sentially a tribunal set up to settle inter-State disputes concerning rights d duties of States"[32]. It is, however, strange that the learned judge voted th the Court in favour of the provisional measures order, despite these parently weighty reservations he had on the exercise by the Court of its ovisional measures powers in this case!

The central issue in the German Application has been the existence of nventional rights and obligations of states in relation to the consular sistance of two nationals of a sending state. Thus there is a convergence the rights of these individuals and those of their national state, both cognised by a treaty. Therefore, this case does not merely involve the hts of two individuals. The threat of execution of Walter LaGrand was so an imminent breach of a treaty right of Germany, as, had he not been ecuted, the rights of Germany could have been partly restored by, say dering retrial of that individual. The question of the rights of the victims murder was superfluous and outside the 1963 Vienna Convention. Article of the Vienna Convention very clearly establishes some basic rights in vour of aliens, and the right of their national state to protect them. Judge la's point that if consular contact had occurred well in time, the judicial ocedure in the US would have remained the same, was at best speculative. accused alien is entitled to all procedural rights based on both the law the forum and international law and any material infringement thereof nstitutes a grave violation of the law.

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Judge Oda's dissent, para 2

*Ibid.*, para 4

*Ibid.*, para 5

*Ibid.*, para 6

*Id.* And judge adds: "I fervently hope that this case will not set a precedent in the history of the Court"

Equally, the Court need not shy away from protecting *per se* the of individuals, whether one or more, on the specious and artificial arg that international law which it is called upon to apply is purely between states and about inter-state relations, and has nothing to do individuals who are a matter of exclusive concern of each state. Sitti the threshold of the third millenium A.D., such a philosophy would r consign the Court into the now-left-undisturbed dustbins of history now generally accepted that the ultimate objective of international law indeed, of all law is human welfare. The Court itself has time and recognized and emphasized "certain general and well recognized princ namely: elementary considerations of humanity, even more exacti peace than in war."[33] It is time the Court, members of the Court, reori their perspectives on the role and function of international la contemporary international community. Even taking a more conserv view, there is nothing wrong "if the Court intervenes directly in the fa an individual", if such intervention is based on or related to some t right or obligation of a state directly at issue in a case. The Court's role not thereby belittle its "function of the principal judicial organ of the U Nations", or of "essentially a tribunal set up to settle inter-state dis concerning the rights and duties of States."[34]

The thrust of President Schwebel's Separate Opinion, on the hand, was on the impropriety committed by the Court in invokin *proprio motu power* of indicating provisional measures, that too wit following the "fundamental rules of procedural equality of the partie At the doctrinal level the issue has had at least two views,[36] and no d the Court decided to exercise its *proprio motu* powers, the way it di view of the extreme urgency of the situation, and perhaps move "elementary considerations of humanity."

## 2. *The Binding Effect of the Court's Provisional Measures Order*[37]

In the *LaGrand* case, the Court's provisional measures requirin United States to "take all measures at its disposal to ensure that W LaGrand is not executed pending the final decision in these proceedi

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33. *Corfu Channel* case, *ICJ Reports* 1949, p. 22.
34. The quotes are from Judge Oda's Declaration, para 6.
35. See paras 3 and 4
36. See Mani, note 22.
37. See generally, V.S. Mani, "Interim Measures of Protection: Article 41 of th Statute and Article 94 of the UN Charter", *IJIL*, vol. 10 (1970), pp. 359-372; Tanzi, "Problems of Enforcement of Decisions of the International Court of J and the Law of the United Nations", *European Journal of International* vol. 6 (1995), pp. 539-572, at pp. 563-570.

ıot produce the desired result—the stay of execution of Walter LaGrand. United States will probably plead failure on the basis of its internal law. the internal law is never a good enough defence on the international e to justify avoidance of an international obligation as was held by the ıanent Court of International Justice way back in 1931 in the *Polish onals in Danzig* Case:

> It should...be observed that ..... a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.[38]

Equally, it is not open to the United States to argue that the Court's er of provisional measures was not binding on it, in view of the ondérant view that such orders are binding on the parties to a case re the Court.[39] In the words of Sir Gerald Fitzmaurice:

> The whole logic of the jurisdiction to indicate interim measures entails that, when indicated, they are binding — for this jurisdiction is based on absolute necessity, when the circumstances call for it, of being able to preserve, and to avoid prejudice to, the rights of the parties, as determined by the final judgment of the Court.[40]

*Implications of Failure to Comply with the Court's Provisional Measures Order*

Independent of Article 94 or Chapters VI-VII mechanisms under the Charter, failure on the part of a state party to a case to comply with a visional measures order of the International Court does not raise issues 'contempt of Court" so typical of a domestic court.[41] However, the rt is entitled to draw whatever presumptions such failure may give rise ı respect of issues of imputability of the impugned state's conduct on ch the claims of the other party may be placed. This may cast on the -complying state party a heavier burden of proof of its claims involved ıe case. Secondly, should the non-compliance itself result in a breach tate responsibility, it may give rise to an additional claim on the part of non-offending party to the case. In the *LaGrand* case, the Court is ıd to examine what damage has resulted, whether under customary or ventional international law or both, from the non-compliance of the rt's provisional measures order.

*PCIJ. Series A B, No. 44*. p.24.
For more on this, see note 37.
For more on this, see note 37, both Tanzi and Mani.
See generally, Mani, note 22, pp. 308-309

## C. Some Issues of State Responsibility

Two groups of issues of state responsibility have been highlight the *LaGrand* case: one, the relationship between the municipal cri justice system of a country and the compliance of international law as the Vienna Convention on Consular Relations by that country, an other, implementation of international law, by the constituent units federal state.

The case before the International Court reveals the total ignoran the deliberate and wanton non-compliance of the international treaty (which is, incidentally part of the Law of Land of the United States by the Arizona State executive and judicial authorities of the United Stat does call for proper education and training, at lower levels, of prosec and judicial authorities.

Second, the present case also underscores the need to take accou the different levels of implementation of international law down t grassroots level. It reveals that international organs, such as the Internat Court, may legitimately address directly to these different tiers of nat authority the issues of compliance with international obligations. Whil the international plane, it is the Unites States which has assumed obliga under the 1963 Vienna Convention, these obligations are required t implemented at the level of a state constituting the US federation. Str in terms of international law, on the international plane, these sub-sta local authorities need not be, and are not usually, recognized and addre However, in the *LaGrand* case in view of the paucity of time and per also to add its own weight to the need for the immediate compliance of obligations, the International Court thought it wise to call upon not onl United States, but also the authorities of the State of Arizona to comply its provisional measures order.

It said:

> Whereas the international responsibility of a State is engaged by the action of the competent organs and authorities acting in tha State, whatever they may be; whereas the United States should take all measures at its disposal to ensure that Walter LaGrand is no executed pending the final decision in these proceedings; whereas according to the information available to the Court, implementation of the measures indicated in the present Order falls within the jurisdiction of the Governor of Arizona; whereas the Governmen of the United States is consequently under the obligation to transmi the present Order to the said Governor; whereas the Governor of

Arizona is under the obligation to act in conformity with the international undertakings of the United States.[42]

It is a pity that despite such direct appeal by the principal judicial organ he international community, the Governor of Arizona preferred to go d with the execution of Walter LaGrand, and made it look far worse a judicial execution, as the mighty federal government of the United es stood a silent and helpless spectator!

## IV. CONCLUSION

The *LaGrand* case is destined to be path-breaking in a field where nary foreign individuals meet the criminal justice system in a country heir temporary residence. In a world where there is such a great ement of people from one country to another, whether due to increasing alization and liberalization or due to sheer economic realities of life, importance of consular protection by a state over its economic emigrant onals can hardly be exaggerated — the more so when a large part of e individuals are uneducated or semi-educated and they are hardly re of their rights. Mostly for economic reasons, there have been large e movements of such individuals across their national boundaries. The ltant exploitation of such foreign migrant labour in affluent countries by now become rampant. In fact, it is not usually realized that many visions of the 1966 International Covenant on Civil and Political Rights CPR) readily protect alien individuals temporarily resident in a country hey apply to "all individuals within [its] territory and subject to [its] sdiction".[43] The UN General Assembly Declaration on the Human Rights ndividuals who are not Nationals of the Country in which They Live, 5[44] and the Convention on the Protection of the Rights of All Migrant rkers and the Members of Their Families, 1990[45] reiterate many of the CPR provisions to ensure a universal standard of treatment of aliens ecting their human dignity.

The normative developments in international human rights law since Universal Declaration of Human Rights 1948 have no doubt vastly mented the traditional concept of consular assistance of aliens by their onal state. However, the *LaGrand* case brings out in sharp relief some he problems of implementation of international obligations in respect

The Court's Order, note 1, para 28, p.7
Article 2(1) of the ICCPR; emphasis added.
Resolution 40/44 of 1985
The 1990 Convention on the rights of the migrant workers seeks to set standards for the laws and judicial and administrative procedures of states for the treatment of migrant workers and their families.

of treatment of aliens, even in a developed country such as the U
States, whatever be the underlying sociological character of
problems—whether xenophobia, federal-State animosity, autonor
local authorities, or ignorance and lack of training in administrati
criminal justice system. The case highlights the lengthening shadow
the candle of the most-outspoken champion of human rights o
international plane!

# PONSE OF INDIAN JUDICIARY TO ENVIRONMENTAL PROTECTION : SOME REFLECTIONS

RAJKUMAR DEEPAK SINGH*

## I. INTRODUCTION

Acutely concerned with the growing environmental degradation in the try, the higher judiciary, especially the Supreme Court of India, has ed itself with techniques of judicial innovation and set upon the task of fronting these environmental challenges with a new vigour. Though a has an impressive array of constitutional, legislative and judicial sures,[1] not much could effectively be done in terms of environmental ection until the dawn of Public Interest Litigation (PIL). PIL has heralded w era of environmental protection in India.

PIL is primarily judiciary-led and even to some extent judiciary-induced a product of juristic and judicial activism in the Supreme Court.[2] It is tred essentially on court actions to have the rule of *locus standi* liberalised s to have grievances placed before the court and then depend upon the rt's ingenuity to provide appropriate relief in each case. Originally nmitted to liberating the victimised and the oppressed,[3] PIL has been

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Some of the important constitutional provisions dealing with environmental protection include Articles 48A, 51A(g), 32 and 226. While Articles 48A and 51A(g) enunciate the national commitment to protect and improve the environment, Articles 32 and 226 provide for judicial review by the Supreme Court and the High Courts respectively. Moreover, legislation like the Water Prevention of Pollution Act, 1974, the Air Pollution Act, 1981, the Environment (Protection) Act, 1986 and a host of other Acts deal with different aspects of environmental protection. The Indian legal system provides for various other judicial remedies which can be found in the law of torts (nuisance, negligence, etc.), the Indian Penal Code, 1860 and the Criminal Procedure Code, 1973.

P.N. Bhagwati, "Judicial Activism and Public Interest Litigation", *Columbia Journal of Transnational Law*, vol. 23 (1985), p.651

In their endeavour to achieve social justice as compared to legal justice, the judges, especially of the Supreme Court, felt that the traditional doctrine of *locus standi* is obstructing the poor and the oppressed from gaining access to the courts. Therefore, they waived this doctrine and allowed any public-spirited citizen to seek relief on behalf of the poor and the underprivileged.

increasing its focus on larger issues of policies, programme administration of the government. Thus, it has been used for effe social control, maintaining communal harmony, preserving the rule o preventing decline in public morality and protecting the environme

## II. INNOVATIVE USE OF JUDICIAL POWERS

### A. Liberalisation of the Rule of *Locus standi*

The liberalisation of the rules governing *locus standi* is one impo facet of the PIL movement in India.[4] Many Indian Judges have felt tha traditional rule of *locus standi*, which insists that only a person who suffered a specific legal injury by reason of actual or threatened viol of his legal rights or legally protected interest can bring an action judicial redress, is "manifestly uncongenial in the social and cultural se of the subcontinent".[5] This rule of standing which deals with a right- pattern had effectively closed the doors of the court to a bulk of population who, on account of poverty and ignorance, could not utilise judicial process, and the Supreme Court has rightly decided to broaden people's access to justice.[6] Now the liberal view is that any member of public having sufficient interest can maintain an action for judicial red of a public injury suffered by a determinate class of persons, provided petitioner acts *bona fide* and is not moved by an oblique motivation. principle was elaborated by Justice Bhagwati in the *Judges Transfer* as follows:

> Where a legal wrong or a legal injury is caused to a person or a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief, any member of the public can maintain an application for

4. Several factors contribute to the erosion of the doctrinal limitation of standing. Sp mention may be made of the realisation of the need to check the abuse of exec authority in a mdoern welfare state, the spreading concern for social justice an emergence of the legal aid movement in the 1970s. Many judges of the Supreme C have also advocated active assertion of judicial power to ameliorate the miseri the masses.
5. *Forward Construction v. Prabhat Mandal*, (1986) 1 SCC 100, p.104.
6. Bhagwati note 2, pp. 570-71.

> appropriate direction, order or writ in the High Court under Article 226 and in case of breach of any fundamental right of such person or determinate class of persons, in this court under Article 32 seeking judicial relief for the legal wrong or injury caused to such person or determinate class of persons.[7]

Taking advantage of this liberalised view of standing, many environmentally conscious individuals and groups sought access to the highest court of India and to judge-fashioned remedies. This resulted, *inter alia*, in the closure of limestone quarries in the Dehradun region,[8] the installation of safeguards at a chlorine plant in Delhi[9] and the closure of polluting tanneries on the Ganga.[10]

## B. Epistolary Jurisdiction

Another innovative use of judicial power by the Indian courts is what has come to be known as "epistolary jurisdiction", where the court can be moved by merely addressing a letter on behalf of the disadvantaged class of persons. These letters usually contain a bare outline of the grievance, the unsuccessful steps taken by the writer to secure relief from the official agencies and a request to the court to set matters right. The line of reasoning for invoking this jurisdiction is that when a member of a public or social organisation espouses the cause of the court, it would not be right or fair to expect the person acting *pro bono publico* to incur expenses from his own pocket to prepare a regular petition for endorsement of the fundamental rights of the poor. A case in point is the *Doon Valley*[11] case where the Supreme Court directed a letter from the RL&E Kendra, Dehradun to be treated as a writ petition under Article 32 of the Constitution. Thus, the Supreme Court has relaxed the requirement of filing a formal writ and this position has been reiterated in the *Sriram Gas Leak* case thus:

> Procedure being merely a hand-maiden of justice it should not stand in the way of access to justice to the weaker sections... this court will not insist on a regular writ petition and even a letter addressed by a public spirited individual or a social action group acting *pro bono publico* would suffice to ignite the jurisdiction of this court.[12]

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7. *S.P. Gupta* v. *Union of India*, AIR 1982 SC 149, p.189.
8. *RL&E Kendra, Dehradun* v. *State of UP*, AIR 1985 SC 652.
9. *M.C. Mehta* v. *Union of India*, AIR 1987 SC 965.
10. *M.C. Mehta* v. *Union of India*, AIR 1988 SC 1037.
11. *RL&E Kendra, Dehrandun* v. *State of UP*, AIR 1988 SC 2187, p.2195.
12. *M.C. Mehta* v. *Union of India*, AIR 1987 SC 1086, p.1090.

### C. Easing Rules of Court Procedure and Practice

Occasionally, the Supreme Court has brought about revolutionary changes in court procedure. In the *Sriram Gas Leak*[13] case, the court allowed an unconnected cause of action to be urged, without requiring amendments to the petition. While the original petition for closure and reallocation of the hazardous industrial plant was pending before the court, there was another leakage of oleum gas from the same plant. Applications for compensation were filed under the original petition on behalf of the affected persons. Sriram's objection to the compensation claim on the ground of not amending the original petition was rejected, the Court stating that a "hyper-technical" approach would defeat the ends of justice. The law relating to pleadings and affidavit also received a liberal interpretation. On many occasions, the Supreme Court has brushed aside the rule requiring a plaint-like petition to be represented for processing. Letters, newspaper reports and even petitons by social workers which do not meet the strict requirements of the rules of pleadings and affidavit are entertained. In a particular case before the Supreme Court, the desirability of emphasising the substance, and not the form, of the pleadings, was expressed.[14] Normally, the higher judiciary does not hold an inquiry into disputed and complicated questions of fact.[15] However, in PIL cases, the judges make special efforts *suo motu* to collect evidence. Appointment of an expert, commission, an advocate, a social worker, a district judge or an official of the state government for making an on-the-spot inspection of the subject matter and submitting a report for examination by the court, appears to have become the norm.[16]

### D. Appointment of Commissioners and Expert Committees

Much of the environmental litigation requires fact-finding, investigation and reporting to the court. Frequently, the court appoints special commissioners to collect facts and data, which form an essential basis of equitable adjudication of justice. In a case where the closure of limestone quarries and mining operations was said to be necessitated by large scale pollution, the court, prior to forming any assessment of discrepant elements of public policy, contrived to secure access to complete and accurate information in respect of all facets of the issues raised. With this end in view, the court appointed a committee of experts, consisting of geologists,

13. *Ibid.*
14. *Ram Swarup* v. *B. N. Inter College*, (1987) 2 SCC 555, p.562
15. *D.C. Reddy* v. *A.S. Agraham*, AIR 1980 SC 105; *Ganeshiram* v. *District Magistrate*, AIR 1976 SC 356; *R.P. Naidu* v. *Govt. of Andhra Pradesh*, AIR 1977 SC 854.
16. Gulab Gupta, "Public Interest Litigation as an Instrument of Social Justice", *Central India Law Quarterly*, vol. 5, (1992), pp. 88-90.

environmental scientists and town and country planners to report on the question of disturbance of ecology and pollution of air, water and the environment generally in consequence of the working of stone crushers or limestone kilns.[17] Similarly, in *Sriram Gas Leak*[18] case, the Supreme Court solicited the help of several expert committees, appointed by the court as well as by the petitioner pursuant to the liberty given by the court. In the famous *Taj Mahal*[19] case also, the court relied upon the reports of the Vardarajan Committee and the National Environmental Engineering Research Institute (NEERI) to ascertain the level of air pollution affecting the Taj Mahal.

### E. Creeping Jurisdiction[20]

Perhaps, a remarkable aspect of PIL is the minute administrative details in which the courts have found it proper to become embroiled in their search for justice.[21] Finding executive response to be absent or grossly deficient, the Supreme Court has used its interim directions to influence the quality of administration, "making it more responsive than before to the constitutional ethic and law"[22]. Occasionally, the court has even gone to the extent of creating its own improvised administrative machinery to remove a public hardship.[23]

A good illustration of the court's creeping jurisdiction is the *Doon Valley*[24] case where the court considered, balanced and reconciled competing policies — including the need for enhancing development, conserving the environment, preserving jobs and protecting business investments — in deciding to close a number of limestone quarries operating in the Dehradun region of the Himalayas and allowing others to continue operating under detailed conditions. In rendering its judgment, the court reviewed the highly technical reports of various geological experts and gave varying weightage to the expert opinions. Unlike the Supreme Court,

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17. See note 11, p.2189.
18. See note 9.
19. *M.C. Mehta* v. *Union of India*, Writ petition (Civil) No. 13381 of 1984, decided on 30 December 1996.
20. Upendra Baxi described *creeping jurisdiction* as the gradual takeover of the direction of administration in a particular arena from the executive. See Upendra Baxi, "Taking Suffering Seriously : Social Action Litigation in the Supreme Court of India" *Delhi Law Review*, vols 8 & 9, (1979-1980), p.106.
21. G.L. Peiris, "Public Interest Litigation in the Indian Subcontinent: Current Dimensions", *International and Comparative Law Quarterly*, vol. 40, (1991), p.75
22. Baxi note 20, p.106.
23. Armin Rosencranz and others, *Environmental Law and Policy in India* (Bombay, 1991), p.130.
24. See note 11

the High Courts have been more restrained in the exercise of quasi-administrative powers.[25]

### F. Interim Orders and Compensation

The Supreme Court has found injunctive reliefs[26] to be inadequate and unsuitable in situations where large scale human rights violations require urgent attention or the intricacies of environmental cases require fact-finding commissions or expert committees to be constituted.[27] Indeed, the Supreme Court evolved a novel idea by expanding the remedial potential of Article 32 to award compensation or damage in all "appropriate cases" involving violation of any fundamental right.[28] The court felt that the scope of Article 32 is wide enough to include the power to grant compensation for violation of fundamental rights. The power of the court under this article is not merely injunctive, but also remedial in scope and provides relief against a breach of fundamental right already committed.[29] The court further stated that:

> ...it is not every case where there is a breach of fundamental right committed by the violator that compensation would be awarded by the court in a petition under Article 32. The infringement of the fundamental right must be gross and patent, that is, incontrovertible and *ex facie* glaring and either such infringement should be on a large scale affecting the fundamental rights of a large number of persons or oppressive on account of their poverty or disability or socially or economically disadvantaged position to require the person or persons affected by such infringement to initiate or pursue actions in the civil courts.[30]

## III. DEVELOPMENT OF THE RIGHT TO ENVIRONMENTAL PROTECTION AND OTHER PRINCIPLES

### A. Right to Environmental Protection

The Supreme Court has, over the years, expanded the boundaries of the

25. Rosencranz, note 23, p.130.
26. Traditionally, injunctive reliefs are used to protect the interests of the parties until a final decision is reached on their rights.
27. A case in point is the *Sriram Gas Leak* case, where the Supreme Court ordered the closure of the plant from where oleum gas leaked, to set up a victim compensation scheme and then ordered the reopening of the plant subject to extensive directions, all within ten weeks of the gas leak.
28. *Annual Survey of India Law, 1987* (New Delhi, 1987).
29. See note 12.
30. *Ibid*, pp. 1086-87.

fundamental right to life and personal liberty guaranteed in Article 21 of the Constitution to include environmental protection.[31] The first indication of the right to a wholesome environment may be traced to the *Doon Valley*[32] case, where the Supreme Court, in an application under Article 32, ordered the closure of some limestone quarries on the ground that their operation was upsetting the ecological balance of the region. Although the judgments of the court do not explicitly refer to Article 21, they can only be understood on the basis that the court entertained these environmental complaints under Article 21. The aforesaid view is supported by Justice K.N. Singh's observation justifying the closure of polluting tanneries in *Ganga Pollution (Tanneries)* case:

> We are conscious that the closure of tanneries may bring unemployment, loss of revenue, but life, health and ecology have greater importance to the people.[33]

While allowing a petition seeking to forbid the construction of government buildings in place of a recreational park, the Andhra Pradesh High Court in *T. Damodar Rao* v. *S. O. Municipal Corporation*[34] clarified the law relating to environmental protection. Justice Choudhary gave an emphatic human right exposition of the law of ecology and environment. According to him, the law on environmental protection gains priority as a right to life and personal liberty over and above the common law theory of ownership of land. He resorted to the constitutional mandates under Article 48-A[35] and Article 51-A (g)[36] to support this reasoning and went to the extent of stating that environmental pollution would be a violation of the fundamental right to life and personal liberty, as enshrined in Article 21 of the Constitution. Thus, the court stated that:

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31. Keeping in tune with the changing times, the Supreme Court has sought to incorporate many facets within the right to life and personal liberty. This right may safely be said to include the right to bail, the right to speedy trial, the right to dignified treatment in custodial institutions, the right to legal aid in criminal proceedings, the right to clean and hygienic environment and, above all, the right to live with basic human dignity. The court also sought to derive *life breath* for the right to live with human dignity and free from exploitation, out of the Directive Principles of State Policy. For a detailed analysis, see Bharat Desai, "Enforcement of the Right to Environmental Protection through PIL in India", *IJIL* vol. 33, (1993), pp.27-40.
32. See note 11.
33. See note 10, p. 1048.
34. AIR 1987 AP 171, p. 181.
35. Article 48-A of the Constitution provides that the state shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country.
36. Article 51-A(g) of the Constitution provides that it shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildife, and to have compassion for living creatures.

> It would not be unreasonable to hold that the enjoyment of life anc its attainment and fulfilment guaranteed under Article 21 of the Constitution embraces the protection and preservation of nature's gift without which life cannot be enjoyed... The slow poisoning of the atmosphere by environmental pollution and spoilation should also be regarded as amounting to violation of Article 21 of the Constitution.[37]

The waiver of the traditional rule of *locus standi* by the higher judici especially in environmental matters, has encouraged citizens to bring m and more issues of public concern before the courts. The citizens's righ free air and the right to clean and potable water were recognised by Kerala High Court in *F.K. Hussain* v. *Union of India*[38] while deciding how to augment the poor groundwater resources so that potable wate made available to all without endangering the environment. The petition alleged violation of their right to potable water because of large-sc withdrawal of water from a well by the local administration of Lakshwadeep Islands. The court held that the right to sweet water and right to free air are attributes of the right to life itself. The court furt directed that the scheme, as envisaged by the administration, should not implemented till viable alternative methods are evolved to augment supply of potable water. It also suggested methods such as rain wa harvesting.

The Supreme Court also recognised the right to be free from atmosphe pollution in *M. C. Mehta* v. *Union of India*[39], where the petitioner alle that pollution in India is mainly on account of increase in the number vehicles in the cities. The court directed the Delhi Administration to furn a complete list of prosecutions launched against heavy vehicles for caus pollution. Rules 115(6)[40], 126[41] and 127[42] of the Central Motor Vehic Rules, 1989 were to be made effective from 1 April 1991. The court a

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37. See note 34.
38. AIR 1990 Kerala 321.
39. AIR 1991 SC 1132.
40. Rule 115(6) provides for certification by manufacturers that each motor veh manufactured conforms to the standards specified in the said Rule.
41. Rule 126 provides that every manufacturer of motor vehicles shall submit prototype of the vehicle to be manufactured by him for test by the Vehicle Resea and Development Establishment of the Ministry of Defense of the Govt. of In or the Automobile Research Association of India, Pune, or the Machinery Test and Training Institute, Budni, and such other agencies as may be specified by Central Govt. for certification by that Establishment as to the compliance of provisi of the Motor Vehicles Act, 1988 and the Central Motor Vehicle Rules, 1989.
42. Rule 127 provides that the sale of every motor vehicle manufactured shall accompained by a certificate of its road-worthiness issued by the manufacture

directed the Ministry of Environment and Forests to find out the effectiveness of a device brought out by NEERI, which would reduce the pollution content and, if found effective, to introduce the same as an in-built mechanism in every vehicle manufactured from 1 April or 1 July 1991 and to examine the adaptability of the device to already operating vehicles.

The apex court has also delivered a series of judgments in numerous *M.C. Mehta* cases to free the National Capital Territory of Delhi from vehicular pollution. Important directions include prohibition on plying of commercial vehicles which are 15 years old by 2 October 1998,[43] restriction on plying of goods vehicles during day time, expansion of premixed oil dispensers, ban on supply of loose 2T oil at petrol stations and service garages,[44] and a ban on the registration of private non-commercial vehicles not conforming with Euro-II emission norms with effect from 1 April 2000.[45]

The Supreme Court's fight against atmospheric pollution was carried further in *S.C. Sukla* v. *State of UP*.[46] A public interest petition was filed alleging atmospheric pollution caused by the discharge of effluents and ash components from the broiler of a sugar factory. However, on the assurance given by the sugar factory that various remedial measures had been initiated, the court directed the UP Pollution Control Board to ensure compliance with the undertaking given by the factory.

### B. Evolution of Environmental Norms and Principles

While treading the path of judicial innovation, the Supreme Court has invented an impressive range of concepts and principles. The principles of strict and absolute liability, the principle of sustainable development, the polluter-pays principle, the precautionary principle and the Public Trust Doctrine have thus found firm footing in Indian jurisprudence.

The Supreme Court has firmly held the view that law should not remain static and that it has to evolve to meet the challenges arising out of new situations. Law has to grow in order to satisfy the needs of the fast changing society and to keep abreast with the economic development taking place in the country. Finding the rule of strict liability as laid down in *Rylands* v. *Fletcher*[47] to be unsuitable for dealing with enterprises engaged in

43. This order was later modified by another judgment of the Supreme Court and the ban on plying commercial vehicles is to be implemented in three phases – 20 years old and more from 2 October 1998; 17 years and more from 15 November 1998; and 15 years old and more from 31 December 1998.
44. *M.C. Mehta* v. *UOI*, AIR 1998 SC 2963.
45. *The Times of India* (New Delhi), 30 April 1999
46. 1992 Supp. (2) SCC 94
47. (1886) LR 3 HL 330

hazardous or inherently dangerous activities in the country, the co unanimously held in *Sriram Gas Leak* case that:

> We would, therefore, hold that where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in operation of such hazardous or inherently dangerous activity resulting, for example, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate to all those who are affected by the accident and such liability is not subject to any of the exceptions which operate *vis-a-vis* the tortious principle of strict liability under the rule in *Rylands* v. *Fletcher*.[48]

Thus, the apex court, by departing from the rule of strict liability as lai down in *Rylands* v. *Fletcher*[49], took an epoch-making decision havin wide ramifications.

In a series of path-breaking judgments towards the end of 1996,[50] th Supreme Court incorporated some of the important environmental norms notably the principle of sustainable development, the polluter-pay principle and the precautionary principle, as part of the law of the land.[5 While rejecting the old notion that development and environmenta protection cannot go together, the apex court held the view that sustainabl development has now come to be accepted as "a viable concept to eradicat poverty and improve the quality of human life while living within th carrying capacity of the supporting ecosystems". Thus, pollution create as a consequence of development must be commensurate with the carryin capacity of our ecosystem. The court further held that the polluter-pay principle and the precautionary principle are esssential features o sustainable development.[52]

The Supreme Court had the opportunity to formally introduce th internationally recognised legal norm, *viz*. the polluter-pays principle, i Sriram Gas Leak case. Reiterating the principle in *Indian Council for Enviro Legal Action* v. *Union of India*[53] case, the apex court ruled that:

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48. See note 12, p. 1099.
49. (1966) L.R. 3 H. L. 330.
50. Some of these cases are : *Indian Council for Enviro-Legal Action* v. *Union of India* JT 1996(2) SC 196; *Vellore Citizens Welfare Forum* v. *Union of India*, JT 1996(7 SC 375; *S. Jagannath* v. *Union of India (Shrimp Culture* case), JT 1997 (1) SC 160 *M.C. Mehta* v. *Union of India (Calcutta Tanneries* case), JT 1997 (1) SC 221 an *M.C. Mehta* v. *Union of India (Taj Mahal* case), *The Times of India* (New Delhi) 6 February 1997.
51. For a detailed discussion on the legal principles, see Bharat Desai, "Analysis of Juristi Principles" (unpublished).
52. *Vellore Citizens Welfare Forum* v. *Union of India*, JT 1996 (7) SC 375.
53. JT 1996(2) SC 196.

> Once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity. The rule is premised upon the very nature of the activity carried on.

The court further interpreted the principle to mean that the absolute ability for harm to the environment extends to the cost of restoring the nvironmental degradation in addition to compensating the victims of ollution. The polluter-pays principle also lays down that the financial cost f preventing or remedying damage caused by pollution should lie with the ndertakings which cause the pollution or produce the goods which caused ne pollution and it is not the role of the government to meet the costs nvolved in either prevention of such damage or in carrying out remedial ction, because the effect of this would be to shift the financial burden of ne pollution incident to the tax payer.[54]

In a significant judgment in *Vellore Citizens Welfare Forum* v. *Union f India*[55], the Supreme Court spelt out the relation between international aw and municipal law. The court observed that once a principle is accepted s part of customary international law, there would be no difficulty in ccepting it as part of domestic law. Defining the precautionary principle n the context of municipal law, the court laid down three ingredients of the recautionary principle:

(*i*) Environmental measures — by the state government and the statutory authorities—must anticipate, prevent and attack the causes of environmental degradation.

(*ii*) When there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

(*iii*) The "onus of proof" is on the actor or the devleoper/industrialist to show that his action is environmentally benign.

hese principles have been reiterated in a number of environmental cases hich came up before the court, viz. *Shrimp Culture*[56] case, *Calcutta anneries*[57] case and the *Taj Mahal*[58] case. They are now being firmly pheld as a basis to determine the liability of polluters and ensure ompliance with relevant environmental legislation.

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4. *Ibid.*
5. JT 1996(7) SC 375
6. *S. Jagannath* v. *Union of India (Shrimp Culture* case), JT 1997(1) SC 160
7. *M.C. Mehta* v. *Union of India (Calcutta Tanneries* case), JT 1997(1) SC 221
8. *M.C. Mehta* v. *Union of India (Taj Mahal* case), *The Times of India*, (New Delhi), 6 February 1997

Primarily corroborating the view that certain common properties as rivers, sea shore, forests and the air are held by the governmen trusteeship for free and unimpeded use of the general public, the Supr Court explained the concept of Public Trust Doctrine in a landmark judgn in *M.C. Mehta* v. *Kamal Nath*.[59] The court ruled that:

> Our legal system — based on English Common Law — includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the sea-shore, running waters, air, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership.[60]

Thus, the apex court established that natural resources meant for public and enjoyment would not be made a subject of private ownership.

## IV. EVALUATION

### A. Is the Door to *locus standi* Open Far Too Wide?

Many jurists fear that the broadening of the rule of standing may le to a number of frivolous and vexatious litigations coming before the cour thereby causing further delays in the adjudication of cases. Justice Krish Iyer refuted this charge stating that "the floodgates argument, often urg on the score that busibodies will flood our courts with frivolous cases, a phony bogey. The idle and whimsical plaintiff, a dilettante who litiga for a lark, is a specter which haunts the legal literature, not the courtroom" He further asked how a bonded labour working in a stone quarry can ev know of moving the Supreme Court of India as, "bonded labours are nc persons, exiles of the system living a life of animals. The bonded labour h no home, no shelter, no food, no drinking water. He has no hope. A hum being without hope has no Supreme Court".[62]

As regards the delay in adjudication of cases, Justice Gulab Gupta fe that in most cases the delay in deciding cases is due to the long-run procedu prescribed in our two Codes, that is, CPC and CrPC. He further states tl these codes have long ceased to be the "codes of justice" and conta

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59. 1996 (9) SCALE 141
60. *Ibid*, p.835.
61. V.R. Krishna Iyer. "Towards a Burgeoning Indian Jurisprudence of Social Act and Public interest Litigation", *Indian Bar Review*, vol. 1, (1989), p.141.
62. *Ibid*.

›cedure that is capable of subverting justice by delaying trial.[63] The lian legislature, on its part, has tried to advance the cause of justice by ıcting a CrPC and amending the CPC, but they remain the lawyer's radise as before. Now, if any reform is to take place in the justice delivery stem, it has to be the efforts of those developing the strategy; the concept PIL has not only given the lead but also displayed its anxiety to make contributions to qualitative improvement in the judicial process.[64]

However, S.K. Agrawala feels that the rule of standing as developed by e Supreme Court for PIL is much too wide. It is extremely doubtful if the ourt will be able to effectively handle all matters brought to it under such widely stated rule. To weed out such apprehensions, the Supreme Court self has to work out some practical guidelines on the subject.[65] Responding this need, the Supreme Court in December 1998 sought to penalise the ouse of PIL. In *Raunaq International* v. *I.V.R. Construction*, the Court ıled:

> When a stay order is obtained...., any interim order which stops the project from proceeding further must provide for the reimbursement of costs to the public in case ultimately the litigation... fails. The public must be compensated both for the delay in implementation of the project and the cost escalation resulting from such delay.[66]

Varning against abuse of PIL, the court said that an interim order could ause undue delay in the completion of the project and escalate costs. Iowever, this ruling will affect legal actions initiated by environmental ctivists. The court needs to clarify whether public interest lies in stopping r completing projects.

### B. Is There A Limit to Treating Letters as Writ Petitions?

The practice of converting letters written by third parties to a particular ıdge into writ petitions has been criticised by Justice Tulzapurkar in a ublic lecture on the ground that "such a practice would result in conferring privilege on the complainant to have a judge or forum of his choice, vhich is clearly subversive of the judicial process which enjoins that no tigant can choose his own forum; moreover, it results in the erosion of the dministrative powers of the Chief Justice..."[67] Similar apprehensions were

3. Gupta, note 16, pp. 83-84.
4. *Ibid*. pp. 84-85
5. S.K. Agrawala, *Public Interest Litigation in India: A Critique*, K.M. Munshi Memorial Lectures, second series (Bombay, 1983), p.16.
6. *Raunaq International* v. *I.V.R. Construction*, 1998(6) SCALE 456, p.466
7. The lecture was delivered at Pune under the auspices of Symbiosis Society's Law College on 29 October 1982 under the title "Judiciary: Attacks and Survival", also published in AIR 1983 *Journal*, pp. 9-18.

expressed by Justices R.S. Pathak and A.N. Sen in *Bandhua Mukti Mor* case where the court reiterated that it is an internal matter of the cour decide which judge or judges will hear a particular petition, "the interfere with which by a litigant or member of the public constitutes the gros impropriety..."[68] A private communication may create "embarrassment the court and the judge concerned".[69]

However, such apprehensions are unfounded as the judge can pass the letter to the Registar for being dealt with according to the nor practice of the court. If the petitioners are addressing letters directly t particular judge, it is because they see the champion of their cause in t judge. Further, converting letters into writ petitions is quite accepta because Article 32(1) of the Constitution does not say as to "who" sh have the right to move the Supreme Court, nor does it say by "wh proceedings. The expression "appropriate proceedings" is too wide, a so moving the court through a letter can be appropriate proceedings.[70] T Supreme Court got an opportunity to clarify the matter where the co observed in *Sriram Gas Leak* case that:

> We must not forget that letters would ordinarily be addressed by poor and disadvantaged persons or social action groups who may not know the proper form of address. They may only know a particular judge who comes from their state and they may, therefore, address the letters to him. If the court were to insist that letters must be addressed to the court or to the Chief Justice and his companion judges, it would exclude from the judicial ken a large number of letters and in the result, deny access to justice to the deprived and vulnerable sections of the community. We are, therefore, of the view that even if a letter is addressed to an individual judge of the court, it would be entertained, provided of course it is by or on behalf of a person in custody or on behalf of a woman or a child or a class of deprived or disadvantaged persons.[71]

Moreover, certain safeguards have been institutionalised.[72] Letters a now being processed by legal aid societies which pass them on to advocat for conversion into proper writ petitions which are represented in a mo satisfactory shape.[73]

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68. *Bandhua Mukti Morcha* v. *Union of India*, AIR 1984 SC 802, p.840.
69. *Ibid*, p.848.
70. Agrawala note 64, pp.17-19.
71. See note 12, p. 1090.
72. There is a PIL cell in the Supreme Court to which all letters addressed to the co or to individual judges are forwarded. After scrutiny, these letters are placed befo the Chief Justice for listing before the court. See also *M.C. Mehta* v. *Union of Indi* AIR 1987 SC 1026.
73. Iyer, note 60, p. 144.

## C. How Far Are Courts Justified in Appointing Commissioners and Committees of Experts?

n the past, the Supreme Court has sometimes appointed commissioners ne purpose of carrying out an inquiry or investigation and making a t to the court. They are appointed on the rationale that the petitioners L cases are not able to produce enough evidence in support of their and impartial assessment of facts is needed swiftly. Because of the tific and technical nature of data required for environmental litigation, upreme Court felt the need for neutral scientific expertise as an essential t to inform judicial decision making. Therefore, the court, in *Sriram Leak* case, urged the Government of India to set up an Ecological nce Research Group consisting of independent, professionally petent experts in different branches of science and technology, who d act as an important information bank for the court and government rtments.[74] In fact, the Supreme Court has utilised the services of expert mittees in various cases coming before it.[75]

One criticism of the appointment of many sets of commissioners or mittees of experts is that their functions may overlap, they may come ifferent findings or they may go beyond their fact-finding function. ever, the Indian courts have tightened their judicial rein as and when necessary to do so. For instance, in a case before the Bombay High rt, the commissioner was criticised for going beyond his fact-finding tion and the subjective portion of his report was rejected.[76]

Thus, a degree of circumspection is called for with regard to absorption ne contents of reports into the corpus of material on which the courts ikely to act. There is a potential danger that error may find its way into cial reasoning or conclusions *via* untested premises or inadequately ied data contained in the report. On the whole, the current practice of ndian courts allows the fullest scope of critical and discriminating use actual material and the recommendations embodied in the reports of rts.[77]

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See note 9, p.981.
Mention may be made of the Bhargava Committee in *Doon Valley* case; G D Agrawal Committee, the Manmohan Singh Committee, the Nilay Choudhary Committee and Seturaman Committee in *Sriram Gas Leak* Case; and the Neeri and the Vardarajan Committees in the *Taj Mahal* case.
*Sergio Calvalho v. State of Goa*, Writ Petition No. 367 of 1988 which came up for hearing in the Bombay High Court
Peiris, note 21, pp.78-79

### D. Is the Judiciary Gradually Taking Over Functions Traditionally Reserved for the Executive and the Legislature?

A substantial degree of detachment from political and social iss been maintained by the Indian judges while dealing with environ matters. Confronted with an environmental conservation *versus* ec development situation, one Indian judge commented that:

> It is for the government and the nation, not for the courts to dec whether the (mineral) deposits should be exploited at the cost ecology and environmental conditions or the industrial requirem should be otherwise statisfied.[78]

On occasions, the Supreme Court has departed from the trad objective posture and even pronounced authoritatively upon the t which legislation dealing with sensitive matters of social policy sho brought into force. The expediency of judicial control of the executi legislative policies has found its typical expression in issues relat preservation of the environment;[79] yet the Supreme Court exercises restraint in venturing into the administrative and legislative arena.

It is also remarkable that the Supreme Court's willingness to ste the administrative vacuum as well as its occasional foray into the legis arena[80] under the cover of PIL have not occasioned the Executiv Parliamentary censure that might have been expected in the wake o a rapid self-expansion of jurisdiction. By carefully selecting matte environment which enjoy wide popular support and issues concerni poor and the underprivileged, the court has so far avoided executiv legislative criticism. Moreover, judges are usually careful while d with matters involving executive action and pass orders only after nego the reliefs with counsel for government agencies. In this collabo fashion, the court avoids confrontation with the other wings of governm

## V. CONCLUSION

The bold, creative and innovative example of the activist judge are unafraid to break with traditions of the past, the widening of the do of standing and the introduction of other appropriate legal strategie

78. *RL&E Kendra, Dehradun* v. *State of UP*, AIR 1987 SC 359, p.363 (per Ra Misra, J.).
79. Peiris, note 21, pp.72-74.
80. *L.K. Pandey* v. *Union of India*, AIR 1984 SC 469.
81. Rosencranz, note 23, pp. 130-31.

insion of judicial interpretation of fundamental rights, especially the t to life and finally, the Supreme Court's willingness to venture into the inistrative arena have designed a fine home-grown jurisprudence and l culture aimed at protection and preservation of the environment. pite all this, PIL cannot be regarded as the panacea of all environmental It requires vigilant citizens and judicial creativity. It is utopian to mpt to make the administration perform only through PIL in such a vast ntry like India with its multifarious problems. Thus, PIL can only be a of the total strategy of the social activist. At the same time, it would be ng to feel that courts are the only suitable forum for the vindication of lic interest. If PIL cases are allowed to flow unabated, the courts will overloaded with commitments which cannot be easily fulfilled and the strategy will lose its credibility and legitimacy.

On the whole, the evolution of PIL especially in environmental matters, been a remarkable judicial contribution in the post-independence era. e activist role played by the higher judiciary has been primarily ponsible for growth of environmental jurisprudence in a wide variety of es. Apparently, some of the judges, in their quest for imparting "social tice", sought to overcome administrative indifference and fix the lacunae the existing legislation. In fact, judicial response to issues of vironmental protection displays the use of various techniques and tools er a period of years. This experience has not been without its limitations, ce judges have often found it hard to balance development requirements l concern for environment protection. The court has also been reluctant intervene in some development projects. The PIL experience in India leed reveals the maturing of judicial response in environmental matters, eping in view the changing circumstances and needs of developing untry like India. In a sense, it has contributed to the raising of vironmental awareness in the country as well as shaking off administrative hargy that seems to have set in the statutory enforcement machinery. is itself is no minor contribution.

# NOTES AND COMMENTS

# DO THE RULES OF EVIDENCE AND PROCEDURE THE INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA ENSURE A FAIR TRIAL?

BIMAL N. PATEL*

## I. INTRODUCTION

The success and respect for criminal jurisdiction of any nationa more even so international systems depend upon the premises of a fair While national criminal jurisdiction has at its disposal an elaborate bo jurisprudence, this is conspicuously lacking in the case of internat systems. The International Criminal Tribunal for the former Yugos (the "ICTY") which has been created by the UN Security Council to p end to grave violations of international humanitarian law that had committed in the territory of the former Yugoslavia and to take effe measures to bring to justice the persons responsible for them has facing an important challenge to ensure a fair trial in all cases broug it. The ICTY is mandated to investigate, prosecute and adjudicate cr within its Statute, such as genocide, torture, enslavement etc. The dra of the Statute and Rules of Evidence and Procedures of the ICTY introduced various standards from developed criminal law syste international treaties and norms, and various amendments to improve Rules of Procedure and Evidence with the objective to arrive at a situa which can be referred to as impartial and neutral.

## II. BACKGROUND

One shall take note of the fact that the Statute of the ICTY was dr up by the UN Secretary-General with some aid from outside, in sort private process, and finally that Statute was adopted by the Security Cou The Security Council is an enforcement organ and not a lawmaking or One can wonder up to what extent the representatives of the Secu Council member states were aware of various complicated aspect substantive and procedural matter of establishing such a tribunal.

A second important factor which one should bear in mind w analysing the 'fairness of trial of the 'ICTY' is daily constraints which

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* Adm/HRB, Organisation for the Prohibition of Chemical Weapons, The Hague views expressed herein are that of the author and do not necessarily reflect of the OPCW, The Hague.

TY faces. These constraints can be summarized as: no law enforcement echanism at its disposal, wide distance between the place of trial oceedings (The Hague) and actual site of events (former Yugoslavia), nguage inability of victims and witnesses and language of the Tribunal, lationship of victims and witnesses with the administration of the republics former Yugoslavia and impediments caused by such administrative ithorities to these victims and witnesses etc. It is against this background iat the Tribunal has to take up the challenge of according full respect to ie rights of an accused while at the same time ensuring due regard for the rotection of victims and witnesses.

## III. CONCEPT OF FAIR TRIAL AS A PRINCIPLE OF INTERNATIONAL CRIMINAL LAW

Fair trial shall always ensure that the accused, witnesses, victims and rosecutors receive all necessary procedural safeguards. Principles of fair rial can be found in various international legal instruments, most prominent mong them are the Universal Declaration of Human Rights and the nternational Covenant on Civil and Political Rights (1966) (the "Covenant") nd several regional human rights legal instruments such as the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950). The Universal Declaration of Human Rights in Article 10 embodies he principle of fair trial:

> "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him".

The International Covenant on Civil and Political Rights further elaborates this principle in Article 14: "[i]n the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone hall be entitled to a fair and public hearing by a competent, independent nd impartial tribunal established by law".

While it goes without saying that the drafters of the Statute have taken reat care in incorporating principles of fair trial in the Statute, the Appeal Chamber in the *Tadic* case faced with the challenge to the Tribunal's uarantees of fairness, justice and even-handedness. To this effect, the Appeal Chamber emphasised that Article 21 of the Statute corresponds to Article 14 of the Covenant and that other fair trial guarantees are stipulated n the Statute and the Rules of Procedure and Evidence. The Appeal Chamber oncluded that "[the Tribunal] provides all the necessary safeguards of fair rial".

## IV. PRINCIPLES OF FAIR TRIAL AS OBSERVED IN THE THEORY AND PRACTICE OF THE ICTY

### A. Rights of Accused

(*i*) The rights of an accused form one of the important aspects dealt v in the Covenant and features prominently in the Statute which creates Tribunal. In Article 20 of the Statute fairness and full respect for an accuse rights is mandated.

(*ii*) In conformity with the provision of Article 14(3) of the Coven on Right to Proceedings in a language which the Accused Understan Article 21(4)(a) of the Statute ensures that the accused shall be '[i]nform promptly and in detail in a language which he understands of the nat and cause of the charge against him'. The Rules of the Tribunal guaran an accused to use his own language.

(*iii*) The question of legal aid, the availability to an accused of adequ representation from the moment he is charged with an offence, is a criti feature of any criminal trial. It becomes very important in cases before t Tribunal in which investigation of facts, assembling of witnesses a relevant documentation requires high costs on the part of accused. Anoth is the high cost of adequate interpretation and translation services, if t Tribunal is to accord fair trial to an accused. Article 21 by means incorporating these principles guarantees an accused adequate time a facilities to prepare his case, a right to counsel of his choice, a provisi of legal assistance and assistance of an interpreter.

(*iv*) The rights of an accused which are of relevance are often summ up in the concepts of a right to be presumed innocent until proven gui and the right to a fair trial as stipulated in Article 14(3) of the Covena '(i)n the determination of any criminal charge against him, everyone sh be entitled to the following minimum guarantees, in full equality...(*e*) examine, or have examined, the witness against him and to obtain t attendance and examination of witnesses on his behalf under the sa conditions as witnesses against him'. Article 6(3) of the Europe Convention for the Protection of Human Rights and Fundamental Freedo expresses similar kind of provision. This provision has been well reflect in Article 21(4) (*e*) of the Statute of the Tribunal.

Despite these sound provisions, there remains two important concer as far as the ri`ghts of the accused are concerned.

(*i*) The Tribunal Rules lack a 'right of confrontation' as provided for b for example in the Sixth Amendment to the Constitution of the Unit States of America, which states that '[i]n all criminal proceedings, t

cused shall enjoy the right... to be confronted with the witness against m'. From this 'confrontational' point of view, one can argue that the ocess of cross-examination is deprived of its effectiveness and purpose, d that consequently no fair trial will result, if the accused does not know identity of the witness. Although this right is not explicitly mentioned the treaty itself and there is no rule of customary law or a general inciple of international law which would bind the Tribunal to such a ovision, this argument has legitimate concerns.[1]

(*ii*) An important right of any accused is to be tried without undue delay d without requiring him to suffer unnecessarily in prison or such other aces. But the experience of the Tribunal appears to suggest that war imes trial, properly conducted, may be very lengthy, involving at least ores of witnesses on both sides. Of course, a care shall always be taken at proper procedures necessary to ensure a fair trial are not affected by e demand for a speedy trial. A careful and delicate balance between these vo is very important and indeed a challenge for the Tribunal.

Apart from the above described guarantees, there are many other rights f the accused which could be referred to, like, for example, the right to file ertain preliminary motions is accordance with Rule 73 (objections based n lack of jurisdiction, objections based on defects in the form of the ndictment or objections on the basis of the *non-bis-in-idem* principle).

### B. Protection and Rights of Victims and Witnesses

While the Tribunal attempts to guarantee and observe the rights of ccused in theory and practice, it also has an equally important obligation grant measures for the protection of victims and witnesses. Indeed, a roper observance of the rights of accused on the one hand and victims and itnesses on the other, can ensure that the Tribunal conducts a fair trial. he Statute in Article 20 requires not only that full respect be had to the ghts of an accused but that there be due regard for the protection of ictims and witnesses. This is the subject of a distinct article, Article 22 hich contemplates that the Tribunal's rules shall provide for such rotection, which shall include, but not be limited to the conduct of *in amera* proceedings and the protection of victim's identity. This becomes nportant in light of the fact that many witnesses for the prosecution will lso be victims and thus this is a far reaching requirement. The reconciliation f these measures with the rights of an accused can often prove to be a atter of great difficulty.

A. Lakatos, 'Evaluating the Rules of Procedure and Evidence for the International Tribunal in the Former Yugoslavia', *Hastings Law Journal*, (March 1995), pp. 909-940

The need to provide protection to victims and witnesses is derived the right of persons to life and safety, as well as the right to priv Therefore, the Tribunal has to place high emphasis to offer and pro sufficient protective measures. This task of the Tribunal becomes difficult because the Tribunal is not equipped to provide wide rang protective measures as are possible in national systems. For example, Tribunal does not have police protection for relatives of witnesses in former Yugoslavia. The Tribunal attempts to achieve this objective ensuring the anonymity of the witnesses.

## C. Other Principles of Fair Trial

Apart from these two important sets of principles, the Tribu enumerates various principles and provisions in its Statute and the R of Evidence and Procedure to ensure that the trials are conducted fairly impartially.

(*i*) Public Proceedings: Rule 78 of the Tribunal stipulates that '[a]ll proceedings before a Trial Chamber, other than deliberations of Chamber, shall be held in public, unless otherwise provided'. T qualification 'unless otherwise provided' is clarified in Rule 79, accord to which the Trial Chamber may exclude press and public from all or p of the proceedings for reasons of public order or morality, safety, secu or non-disclosure of the identity of a victim or witness or the protection the interests of justice.

(*ii*) Faith in the Impartiality and Competence of the Tribunal and Members: The *Tadic* case has provided a serious challenge to competence of the Tribunal. It is very important that any court of trial its members ensure a highest level of impartiality and competence ensure proper respect and faith in the fairness of the trials. Indeed t principle is a first and foremost pre-requisite of any fair trial. Rules 14 15 provide important stipulations in this respect.

(*iii*) Apart from these constitutional or theoretical principles, there some practical benefits which the Tribunal can afford because of international status in contributing a fair trial. For example, the Tribu being a prestigious international body has more opportunities to investig the case matters and can threaten or force countries to co-operate. Tribunal's funding facility and its capability to employ proper defence the defendants can be considered as important additional attributes ensure its overall objective of guaranteeing rights and protective measu of accused and victims and witnesses respectively.

## V. CONCLUDING REMARKS

From the above foregoing analysis the following conclusions arise:

1. The Tribunal's Statute and Rules of Evidence and Procedure meet, incorporate and apply principles and rules of fair trial as embodied in the international legal instruments as well as several regional and national criminal codes of conduct. However, it shall be noted that the unique character of the Tribunal and its unique legal framework, as well as the particular circumstances in which the provisions of the Statute and Rules of Procedures are to be applied, warrant the Tribunal to interpret these provisions within its own legal context.
2. While analysing the fairness of a trial, one shall always keep in mind the daily constraints, as mentioned in the beginning, under which the Tribunal operates.
3. The theory and practice of the Tribunal provide important lessons for the future Permanent International Criminal Court.

# THE FAILURE OF HUMANITARIAN INTERVENTION IN RWANDA AND THE NEED FOR RECONCEPTUALISATION

SUSHIL RAJ*

The focus of this paper is the concept of humanitarian intervention, its definition and use by the international community specifically in the case of Rwanda. It will be argued that in this case humanitarian intervention was narrowly defined along realist lines with a restrictive interpretation of the concept, which in turn determined the handling and consequent outcome of the disaster. It will also be argued that had the international community interpreted humanitarian intervention along broader lines, equating human rights violations in Rwanda at the level of a threat to international peace and security, it would have been able to reduce the nature and effects of the genocide. Although this paper raises more questions than it answers, an attempt, nevertheless, is made at prescription. A model that incorporates forcible intervention into non-forcible intervention has been borrowed from Ramsbotham and Woodhouse to show a possible direction that reconceptualisation can take. The initial part of the paper focuses on conceptual approaches to humanitarian intervention, highlighting the debates within international law and politics, which are then applied to the case of Rwanda to show failure and the need for reconceptualisation.

## I. INTRODUCTION

The UNAMIR (United Nations Assistance Mission to Rwanda) force commander, General Romeo Dallaire, repeatedly asked his seniors in New York for a change in mandate so that he could use force to restore control in the capital city of Kigali before it spread to the countryside. He believed that a contingent of 2,500 soldiers was sufficient for him to contain any major outbreak of violence until reinforcements arrived. Two weeks into the slaughter, he continued to state that the killings could be ended with five to eight thousand troops and a change in mandate from peacekeeping to peace enforcement. This enhancement of the mandate was refused while UN soldiers watched people being massacred before their eyes. The consequent scenario that unveiled was one of the most gruesome cases of genocide in the twentieth century. It stands out as an example of neglect and indifference of the international community in general and the Clinton Administration in particular. At the height of the massacres the Clinton Administration downplayed the genocide diplomatically and impeded effective UN intervention to stop the carnage. An estimated 500,000 to 1

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illion Tutsi[1] were massacred in a matter of weeks followed by an outflux f nearly one million Hutu to neighbouring Zaire and Tanzania. This had trong repercussions in Burundi as it led to another large set of massacres ut this time by a Tutsi led government.

At the heart of the UN refusal was the international community's, more pecifically the United States', perception of what constituted humanitarian ntervention. In the case of Rwanda intervention did not coincide with US olicy interests and was therefore deemed unnecessary. The United States pplied a restricted definition of intervention along 'realist' lines in order o avoid any involvement in the conflict. The way humanitarian intervention was defined by US policy makers then determined the response of the nternational community. This, of course, raises many issues that need to be addressed, particularly what constitutes humanitarian intervention as well as what is the nature of the debate in international law and politics. As a concept, humanitarian intervention is fraught with inherent complexities chiefly due to disagreement within the international community over its definition and legitimacy as an instrument of peacekeeping and saving lives. Most theorists broadly categorise humanitarian intervention into forcible (military) and non-forcible, although some do not consider non-forcible humanitarian assistance to be a form of intervention. The focus and emphasis of this paper is on forcible intervention, which is the issue currently being debated internationally.

## II. DEFINING SOVEREIGNTY AS THE BASIS OF NON-INTERVENTION

Fundamental tension in humanitarian intervention stems from the concept of sovereignty, which is based on the international system of states and their right to function independently and free from any outside interference or authority. It is based on the norms of equal rights of states and of non-intervention in a state's domestic affairs, which are enshrined in Articles 2(4) and 2(7) of the UN Charter. Article 2(4) provides:

> All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

While Article 2(7) provides:

> Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the

1 Ahlbrandt Stephanie. *The Protection Gap in the International Protection of Internally Displaced Persons: The Case of Rwanda* (Geneva, 1996), p.11

domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Two aspects, the inner and the outer, define sovereignty. Peace and non-interference are internal aspects, while the right to wage war as an independent sovereign state is the external one. The norm of non-intervention is often seen as the other side of sovereignty. Often times this leads to a pull in opposing directions between the right to wage war (its outer manifestation)—a constitutive feature of sovereignty and the right to non-intervention (its inner aspect) — also a constitutive feature of sovereignty.[2] Further, non-intervention presents itself with inner and outer aspects as well. The outer aspect of non-intervention introduces order from anarchy, minimising inter-state conflict, because sovereignty can all too easily lead to conflict. It serves as a constitutive feature of international society by assigning it a collective-cooperative nature. If every state were to violate this norm, there would be no international society. Further, if we were to say that the rights of states are derived from the rights of individuals, one can see the principle of state sovereignty acquiring a human rights component. Violation of this principle can then have serious implications.

The inner aspect of non-intervention revolves around popular sovereignty and the self-determination of people. This raises the question of whether a government that loses its inner legitimacy (its popular base) loses the outer aspect of its legitimacy as well?[3] If not, then does the principle of state sovereignty mean that states are free to engage in the indiscriminate slaughter of their ethnic, religious minorities? Do others have a right or even a duty to intervene if this takes place? Can the immunity of states from 'intervention' be an exceptionless norm? Is that what international law suggests? This question is at the crux of the debate that we are addressing. It reveals that the inner and outer aspects of non-intervention are in tension here. The root of the classical debate concerning humanitarian intervention then lies in the non-intervention norm.

## III. WHAT THEN IS 'HUMANITARIAN' IN INTERVENTION?

The term 'humanitarian' as Murphy[4] describes is "very broad and in common parlance used to describe a wide range of activities by

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2. Oliver Ramsbotham and Tom Woodhouse, *Humanitarian Intervention in Contemporary Conflict* (Cambridge, 1996), pp. 34-35.
3. *Ibid*, p 37.
4. Sean Murphy, *Humanitarian Intervention* (Pensylvania, 1996), p.8.

ernmental and non-governmental actors that seek to improve the status well-being of individuals. Even if narrowed to a concept of protecting an rights, that term potentially encompasses a broad array of political, al and economic rights. The international community is not fully in eement on the normative content of many human rights, let alone on ther there is a hierarchy of values to be ascribed to those rights. However, ne grants that there are certain human rights upon which there is more ess universal agreement, there continues to be a subjectivity over whether e rights are threatened and must be protected". As Murphy states, this ectivity raises questions of who is competent to make those decisions. t the international community as a whole or is it the group of states ducting the interventions? How does one assess a case where the crisis es from competing factions within a state? If the view of the state ducting intervention is relevant, must the intervention be exclusively nanitarian or is it acceptable that other motivations be present as well? vocates of the 'just war'[5] tradition believe that discriminate use of force a state in circumstances where mediation, negotiation, and conciliation e failed, would be morally justified to pursue "politics, freedom, order, general peace and welfare". Thomas Weigel states that "the end does justify any means, but the means derive their justification from their kage to a just end".[6] How one deals with the question of motive behind nanitarian intervention, becomes particularly important since it allows ions to canvass their interests behind intervention.

The term 'intervention' is also a broad one and has been the subject of bate in international law and within the UN for a long time. Hersch uterpacht, a prominent international jurist, states that intervention gnifies dictatorial interference in the sense of action amounting to a ial of the independence of a state". For our purposes, intervention that being considered is intervention in the domestic affairs of a nation that of a coercive nature (resisted by the state government that is being geted) to end human rights violations or undertaken to put an end to a uation of domestic chaos in which an existing government no longer has legitimacy or various factions assert form of control. A narrower concept intervention may, however, continue to be marred by ambiguities e.g. h an interpretation does not make clear whether a low level, temporary loyment of military forces, in which there is no intent to change political uctures or territorial boundaries of the target-state, qualifies as ervention.

George Weigel, *Idealism without Illusions: U.S. Foreign Policy in the 1990s* (Michigan, 1994), p. 158.
*Ibid*, p. 166.

## IV. CONCEPTUAL APPROACHES TO HUMANITARIAN INTERVENTION

Despite the conceptual difficulty of defining humanitarian intervent one may categorise interpretations of the concept into two broad can namely that of restrictionist and counter-restrictionist.[7] Restrictionists adh to two main elements. One is the belief that other UN aims are subserv to the main purpose of maintaining international peace and security. Sec is the adoption of a broad interpretation of Article 2(4) of the UN Char which increases its ability to restrict the use of force. The unilateral use cross-border force is prohibited therefore not leaving much scope humanitarian intervention. The sole test of humanitarianism restrictionists is the 'motive' of the intervening government, beyond t the humanitarian element is left unanalysed. Ian Brownlie[8], one of leading restrictionists, clearly presents a case for non-intervention when says:

> My position is that humanitarian intervention, on the basis of all available definitions, would be an instrument wide open to abuse... There is a great deal of useful circumstantial evidence which suggests both that the law does not recognise humanitarian intervention and also that the prognosis for such action as a genuine instrument for the benefit of mankind is not good... Whatever special cases one can point to, a rule allowing humanitarian intervention, as opposed to a discretion in the United Nations to act through the appropriate organs, is a general license to vigilantes and opportunists to resort to hegemonial intervention.

A good classical working definition of the restrictionist view is o given by Vil Verwey. To him humanitarian intervention is "the threat use of force by a state or states abroad, for the sole purpose of preventi or putting a halt to serious violations of fundamental human rights, particular the right to life of persons, regardless of their nationality, su protection taking place neither upon authorisation by relevant organs the United Nations nor with permission by the legitimate government the target state".[9] Other restrictionist scholars like Ian Brownlie consid authorisations of the United Nations to be within the ambit of the classic definition. Most restrictionist definitions take into consideration five facto purpose — widespread deprivation of human rights; agency — individu

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7. Arend and Beck quoted in Ramsbotham and Woodhouse, note 2, p. 61.
8. Quoted in Ramsbotham and Woodhouse, note 2, p. 64.
9. W. Verwey, in E. Ferris (ed.), *The Challenge to Intervene: A New Role for the Unit Nations* (Uppsala : Life and Peace Institute, 1992), p 114.

e, group of states, or multinational international organisation taking on; target — a *de jure, de facto* government or various factions that are ontrol; force level; and lastly context — whether it is a sense of altruism ational interest, what is the context within which intervention is framed? issue of whether or not consent is given, although excluded in some nitions, is important since lack of authorisation makes it necessary to ntify an authority.

Counter-restrictionists argue that forcible humanitarian intervention is ited and temporary. Thus it does not threaten the 'territorial integrity or itical independence' of a target state[10] and does not constitute a part of icle 2(4) of the UN Charter. Further, they claim that protection of human hts is as important as maintaining international peace and security. erefore, humanitarian intervention is not 'inconsistent' with the UN's rposes.

This technical debate within international law connects with the broader itical and ethical debates surrounding humanitarian intervention. In the lm of politics, one questions whether great power rivalry during the cold r, regional self-interest, and the non-intervention norm all protected the ustices of human rights violations. In the context of the post-cold war rld, the geopolitics of humanitarian intervention show signs of couraging enforcement action in general, thus leading to avoidance and k of commitment in extreme emergencies like Rwanda. A large part of rcible engagement has been affected by the so-called 'Mogadishu ndrome'[11] — the fear of getting forces involved in an outright conflict s undermining their impartiality. This has resulted in enforcement action ing limited to aerial engagement, Bosnia and Kosovo being the most ominent examples after the operations in Somalia. In the realm of ethics, bate continues over values that inhere in state-systems and the values ople hold within states. The two main components of the non-intervention rm as discussed come into tension here, namely reciprocity and mutual ognition of state equality being one component and popular sovereignty d self-determination being the other. An analysis of law and politics ows that international law constrains the national interests of states while litics asserts the right to put forward a state's agenda. Such complexity s consistently given rise to controversy and inconclusive results.

This continuing debate over humanitarian intervention is responsible the way humanitarian action is carried out with or without clear

Position held by international lawyers like Fernando Teson, *Humanitarian Intervention An Inquiry into Law and Morality*, (New York, 1988), p 131.

Richard Falk, "The Complexities of Humanitarian Intervention A World Order Challenge", *Michigan Journal of International Law*, vol. 17, (1996), p. 505

objectives, the latter being the case of Rwanda. Going back to the que asked earlier of whether the immunity of states from 'intervention' ca an exceptionless norm, we may now have an answer. Given the limita of international law and lack of agreement over the concept of humanit intervention, one must simplify the debate by saying that a well-fou humanitarian claim can be an exception to the prohibition of n intervention or a suspension of such a prohibition due to the scale extent of brutality. Morality which is reinforced by human rights provis under the Universal Declaration of Human Rights, the Internatio Covenant for Civil and Political Rights, and the legal authority of Security Council for using coercive measures derived from Chapter VI the UN Charter can be used to override the non-interference principle Article 2(7). If the Security Council determines that ethnic conflict threat international peace and security, then Article 2(7) on prohibition of UN regional intervention can be extinguished. The Security Council also h the authority to adopt measures under Article VII of the Convention on Prevention and Punishment of Genocide, 1948.[12]

Simplifying the debate, however, is not an answer, nor is it design to provide one. It allows us to apply the concept to the case of Rwanda f purposes of analysis. Analysing Rwanda through this simplified perspecti highlights the need to reconceptualise the concept of humanitari intervention, if we, the international community, want to prevent serio and massive violations of human rights.

## V. LINKING CONCEPT WITH CONSEQUENCES — THE INTERNATIONAL RESPONSE TO RWANDA IN 1994

United Nations efforts to respond to the crisis were reactionar disorganised, and for the initial part a complete failure. In the wake President Habyarimana's death, the UN Assistance Mission to Rwand was unable to prevent the outbreak of widespread violence. Ten Belgia soldiers were killed in the immediate aftermath following Habyarimana death, leading to the withdrawal of the entire Belgian contingent.[13] C April 21, the Security Council adopted a decision to reduce UNAMI forces from 2,000 to 270. The US heavily influenced this decision becau eighteen of its soldiers had been killed in Somalia at the time. UN Secreatr General Boutros-Boutros Ghali strongly urged the Security Council c

12. Article VIII provides: "Any Contracting Party may call upon the competent orga of the UN to take such action under the Charter of the United Nations as they consid appropriate for the prevention and suppression of acts of genocide.

13. David, Callahan, *Unwinnable Wars — American Power and Ethnic Conflict*, (Ne York, 1998), p 183.

pril 29 to deploy an African contingent under the UN flag, submitting a an a few days later asking for the deployment of 5,500 soldiers to Kigali. y this time approximately 200,000 people were estimated to have been lled and 250,000 to have fled the country.[14] Initially the Security Council uld not agree on moving forward with this plan mainly due to resistance om the United States, which pointed out that no state had made a firm fer to send their forces to Rwanda and that the Rwandan factions had not ven unconditional assent to the UN operation.[15] It must be noted here that rcible humanitarian intervention as defined classically can operate with without the assent of the government in power. In this sense, the United ates was applying an even more limited definition within the restrictionist pproach as a means of justifying its position of detachment from the ents occurring in Rwanda.

On May 5, the Clinton Administration unveiled the Presidential Decision irective 25 placing rigid limits on peacekeeping operations, whether or ot they included any American troops. On May 17, other Security Council embers pressurised the United States to drop some of its objections and nanimously approved the deployment of 500 more Ghanaian eacekeeping soldiers under the expanded UNAMIR mandate. This panded mandate, however, still did not allow the UNAMIR to use nforcement action. By this time 14 other African nations offered to ontribute soldiers and on 8 June, 1994 the Security Council passed esolution 925 authorising the deployment of 5,500 soldiers and ecifically asked UNAMIR to provide security and protection for displaced ersons and relief workers.[16] However, disagreement over logistics between e US and the UN severely impeded the deployment in the weeks to come. y this time the rebels from the Rwandan Patriotic Front (RPF) had made gnificant gains and captured northern and eastern Rwanda. This was ading to an exodus of Hutu refugees and of a concentration of Hutu overnment forces in the west.

On June 15, France announced its readiness, along with other states, to rcibly intervene in Rwanda out of rising humanitarian concern. Other ates, however, were not in agreement with France given its role over the

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. Murphy, note 4, p. 244.

. *Ibid*, p. 245.

S.C. Res. 925, UN SCOR, 49th Sess., 3388th mtg., UN Doc. S/RES/925 (1994). The text of paragraph 4 reads: Security Council...*Reaffirms* that UNAMIR in addition to continuing to act as an intermediary between the parties in an attempt to secure their agreement to a cease-fire, will: a) Contribute to the security and protection of displaced persons, refugees, and civilians at risk through the establishment and maintenance, where feasible, of secure humanitarian areas. b) Provide security and support for the distribution of relief supplies and humanitarian relief operations

years of arming and training Hutu government forces, forces that responsible for most of the killings. France's impartiality was doub it made the statement to intervene at a time when the tide had changed Tutsi extinction to Hutu exodus. There were concerns that the F might seek to bolster Hutu government forces in their fight against rebels. The leaders of the Tutsi rebels immediately declared their oppo to intervention by France. This suspicion of other states is illustrati the argument put forward by restricionists that a state may intervene i name of humanitarianism and have its own interests at stake. The que was whether it was France's altruism or its national interest that moti it to intervene. This stresses the importance of the element of 'conte the restrictionist definition and suggests that at the height of this geno state actors were perceiving France to have applied a restrictionist defini

The US supported the idea of French intervention while declinin provide any forces of its own. This enabled the US to work out its logi with the UN. On June 22, the Security Council passed Resolution 929 authorised French troops to use "all necessary means to achieve humanitarian objectives". This clearly illustrated the Security Coun ability to override any article prohibiting non-intervention. The resolu kept the troops under French and not UN command, which showe reluctance to assign an enforcement role to UNAMIR. One of the abstentions to this resolution was of Brazil which noted the difficult simultaneoulsy operating peace-keeping and peace-enforcing operat in the same state and suggested that the Security Council avoid usin extraordinary powers under Chapter VII of the UN Charter.[17]

On June 23, French troops in armoured vehicles and helicopters cro over from Zaire. Initially, the French made strong efforts to show that tactics were evenhanded by going after the Hutu irregular militias disarming them. French soldiers also came into direct confrontation the Rwandan Patriotic Front while attempting to protect civilians. Fr then requested the Security Council to authorise the creation of a safe z In the days that followed, France took upon itself to declare a safety in southwestern Rwanda (Cyangugu-Kibuye), while the issue was b debated at the UN. France assumed the role of active engagement by fi upon any Tutsi rebels attempting to enter the zone. By the time a cease was announced more than a million Hutu sought refuge in the French z Actions of the French forces, though controversial, ultimately confir an overall humanitarian motivation and as such, one would argue that French action fit the concept of humanitarian intervention. Fran intervention may have been influenced by its sense of responsibility

17. Murphy, note 4, p. 251.

rming and advising Hutu-dominated government military forces that proceeded to massacre hundreds of thousands of people. This possibility also indicates that wholly disinterested states feel no need to intervene in crises or regions where they have no historic or political ties.

Part of French successes was its recognition to use military enforcement and not simply position its forces as peacekeepers with undefined goals. The zone established by France affected the RPF's ability to advance but at the same time France distanced itself from any affiliation with the Hutu government leaders. Part of French weakness, however, arose from its desire to minimise its involvement to the safe-haven area. By establishing a safe zone in southwestern Rwanda for only two months, the impact of intervention on the protection of civilians in the long run was significantly reduced. It caused further anxieties and at the time of French departure a fresh outflux of refugees from the safety zone. An overall evaluation of French action shows that it was extremely effective for the time it was there.

From the chronology of events, we see that efforts of the United Nations were impeded by a lack of US interest in the region because the Great Lakes were never a high priority area on its African policy agenda. The 1972 genocide hardly made a noticeable impact on US policy makers and during the early 1990s, the United States was not moved in any way to act against the government of President Habyarimana, who played a complicit role in much of the violence that was to follow. Some scholars like Callahan argue that the US, in assessing whether humanitarian intervention should have been carried out, was conditioned by threats to its 'vital interests'. These vital interests were perceived to be the protection of US lives, security of core allies, health of the global economy, and overall stability of the international system.[18] In refuting this framework, one could argue that if only three of the four vital interests were addressed and were not adequately defined, then a country would fail to take preventive action anyway. This would result in short term reactionary responses, from one crisis to the next. This is precisely what happened in the case of Rwanda, since it was perceived as an insignificant threat to international stability. The result was a short-term crisis response that failed miserably.

From this interpretation of the crisis, it is also revealed that the US perceived mass slaughter, human rights abuses, starvation, etc. as secondary interests.[19] A history of US monitoring of ethnic conflict in important states such as Nigeria, Lebanon, Ukraine and the outright neglect of Rwanda only too readily shows how national interests govern a state's perception

18. Callahan, note 13, p. 43
19. *Ibit*, p. 45

of humanitarian intervention. National interests then directly influ interpretations of concepts. This is where the realm of politics crosses the realm of law, where a state interprets international law to suit its objectives. International law operates within a domain of internat society gravitating towards the realist direction of individual state int and power and away from the progressive perception of international being a concept of change and of furthering the people's and government's interests.

The real failure of humanitarian intervention in the case of Rw then, was not one of prediction, because low level officials were extrer well aware of the occurrences and currents within Rwanda. The failure in the lack of political will shaped by the incongruence of events in Rwa to US national interests, which further translated into a narrow defini of humanitarian intervention along restrictionist lines.

## VI. CONCLUSION

Regardless of the debate in international law, politics, and ethics o the concept of humanitarian intervention, the international commun continues to demand cross border military intervention where mass human rights violations are taking place. In many cases governments n be drawn in for reasons other than humanitarian and for these governme such special interests will always exist. Nevertheless, oft times th governments are motivated by genuine humanitarian concerns. T importance of some response to the need of protecting victims, humanitar aid workers and many a times peacekeeping forces themselves stresses unspeakable need for enforcement action by member states of the U whether it is unilateral or multilateral.

In order to secure legitimacy for humanitarian intervention it th becomes important to reconceptualise the term. A suggestion for su reconceptualisation is borrowed from Ramsbotham and Woodhouse[20] w believe the term 'forcible humanitarian intervention' should be made a p of the wider class of 'non-forcible humanitarian intervention'. They belie this should make up the reconceived definition. Whereas in the classi terminology, 'humanitarian intervention' meant forcible self-help by sta across international borders to protect human rights, the new definiti Ramsbotham and Woodhouse suggest, would consider 'forcil intervention' in an expanded version of the classic concept to inclu collective action as well as self-help and non-forcible intervention. Su a definition would establish a clear relationship between military and n

20. *Ibid*, p. 113.

military dimensions of the post-cold war usage of the term, that of securing 'humanitarian space' within which non-military aid and relief agencies could operate. It would also allow us to move beyond the all or nothing options that restrictionist definitions place. Under the reconceptualisations, we are no longer asked to be for or against forcible action, but required to compare different options in response to any given humanitarian challenge.

Scholars like Falk[21] suggest a number of conclusions after analysing humanitarian emergencies such as: being seriously engaged in a preventive role; balancing external encouragement of nationalist tendencies towards self-determination with adequate protection of human rights; outside military forces and diplomats acting as catalysts towards the implementation of a peace process once stalemate is reached; supporting grassroots and transnational initiatives during the phase of most intense humanitarian emergencies and in the absence of interventionary response; and lastly, the need of 'critical geopolitics' to convince those who dominate decisions over the allocation of resources that conflict prevention is conducive to global prosperity. These measures, however, are designed to address pre and post-crisis measures. They do not offer a prescription in terms of overcoming the problem of barriers to enforcement action during a crisis. The need to reconceptualise the notion of intervention is not addressed though the need to analyse it is. Unless this issue is addressed any attempt to deal with the crisis will be insufficient.

Another essential aspect involves seeing humanitarian assistance as centerfold and not in isolation to security issues. The cost of failing to address protection is not only high for states within which conflict is taking place but also for outside powers as well. Forcible intervention becomes a necessity when certain technical tasks arise, such as the dropping of food supplies to communities under siege, protecting humanitarian aid workers, which not only requires use of force for self-defence but also to deter and create a 'humanitarian space' within which workers can operate. Humanitarian action inevitably becomes enforcement action when security is needed, above all else, for those being assisted, especially when such groups cannot be taken far away from the conflict. In such close proximity to the source of violence, their security can seldom be ensured by neutral and impartial non-military action alone. Most importantly, if safety zones are proclaimed, as seen with the French Operation Turquoise, there has to be a will to fight and deter attacks.

Conflicts following the cold war have seen the revival of humanitarian intervention through multilateral involvements, which do not have the consent of the country concerned. Such involvements have represented a

21. Falk, note 11, p. 512

major means of linking humanitarian intervention and the use of f successfully. However, since there is no agreement within the internati community on the legitimacy of humanitarian intervention and even on the circumstances within which it might be justified, it beco imperative that the concept of humanitarian intervention reconceptualised to secure some concrete form of legitimacy. The Rwar experience only too readily shows us the disastrous outcome of ambigu usage of the concept.

Forcible intervention is a matter of necessity in many cases, particul where a government loses its inner legitimacy and continues to com human rights violations against its populace. I would argue that if inte popular legitimacy is lost and there is a total collapse of the state (cases Somalia), then that government forfeits outer immunity and the right non-intervention. If we move towards some concrete definition intervention, by reconceptualising and incorporating it within the broa ambit of humanitarian assistance, then states would be obligated to as and intervene. Collective security is dependent for its success on a minim level of political solidarity. Reconceptualising humanitarian interventi would assist us in attaining this minimum level.*

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* Editorial Comments: Many articles have appeared in this *Journal* on intervention. T last one was V. S. Mani, "Humanitarian Intervention and International Law", *IJ* vol. 33, (1993), pp. 1-26.

# INDO-FRENCH SYMPOSIUM, NEW DELHI 17-18 NOVEMBER 1998

## I. INTRODUCTION

This is the first time that an Indo-French Legal Symposium was organised, from the French side by the Society of Comparative Legislation, in collaboration with the Henri Capitant Association and the Superior Council of the Bodu of Nataries, Paris, and from the Indian side, by the Indian Society of International Law (Secretary-General: Dr. V.S. Mani and Director: Mr. D.S. Mohil) and the Law Faculty of the Delhi University. Also participated actively in organising of this meeting were H.E. Mr. Claude Blanchemaison, Ambassador of France; Mr. Bernard Malauzat, Cultural Counsellor at the French Embassy in New Delhi. A second phase of the symposium was subsequently held in Pondicherry at the initiative of Judge David Annoussamy of Pondicherry. But this report covers only the New Delhi segment.*

The theme dealt with at the New Delhi Symposium was "Freedom in economic, public and private law". The symposium took place at New Delhi, on 17th November at the premises of the Indian Society of International Law. It covered aspects of public and economic law, with the participation of representatives from various Universities and research Centres in Delhi (Delhi University, Jawaharlal Nehru University, the Indian Law Institute and the Indian Society of International Law) and practitioners, advocates, legal counsels. On 18th November, a visit to the Delhi University enabled the participants to get in touch with some of the teachers at the Law Faculty and the Dean, Professor A.K. Koul, to have a very instructive exchange of views leading to proposals of co-operation between India and France through exchange of publications, articles, teachers or students. It has been decided that the proceedings of the symposium will be brought out in the form of a publication co-sponsored by the Indian Society and the Paris Society.

## II. WORKING SESSIONS

### A. Freedom in Public and Economic Law

The discussion on this topic took place in the meeting of 17th November 1998, at the Indian Society of International Law, with Professor,

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* This is an English adaptation of a report compiled by the *Societe de Legislation Comparee*, Paris.

Rahmatullah Khan, Rector of the Jawaharlal Nehru University, Edito Chief of the *Indian Journal of International Law*. After a welcome stater by Professor V.S. Mani, Secretary-General of the Indian Society, ar vote of thanks by Professor X. Blance-Jouvan, President of the Societ Comparative Legislation, on behalf of the French Delegation,[1] Profe A.K. Koul, Dean of the Delhi University, presented his paper on "Relati between the Central Government and credentials of States in the field trade and investments"[2]. He pointed out that the Indian Constitution dr its inspiration, in this field, from the American, Australian and Canad federal systems. It has taken note of the immensity of the country and the diversity of its cultures. The preamble to the Constitution declares t India is a democratic country, the fundamental principles of which those of social welfare of human beings without any discrimination bas on race, religion, language or any other. The Indian State is a secular St where all customs and religions are accepted and they co-exist.

The Constitution stipulates formation of a Government based on electoral system; the Union Parliament and the Legislative Assemblies a elected. The Executive is formed by the political party that can comma a majority in the legislature. The Supreme Court of the Union and the Hi Courts of the States supervise the execution of the Constitution. They a the watchdogs of the Constitution.

As for trade, Prof. Koul pointed out, it is the federal legislation whi is applied pursuant to Article 245 of the Constitution. Moreover, t Constitution provides for a scheme of distribution of powers between t Union and the States on the basis of three lists of items made for th purpose. The Union exercises jurisdiction over the defence of the countr immigration, foreign relations and other powers relating to treatie international conventions etc. As for the economic power (exports ar imports), it falls within the purview of the Central Government, but Stat have some autonomy in respect of the federal legislation. Under Artic 301, trade is unfettered as there are no limitations. However, Artic

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1. This Delegation was composed of Messrs. and Mrs. Xavier Blance-Jouvan, Profess at the University of Paris I, President, Society of Comparative Legislation, Floren Bourg, Advocate at the Paris Court, Patrick Daillier, Professor at the University Paris X, Marie Gore, Professor at the University of Paris V (Association Her Capitant), Laurence Idot, Professor at the University of Paris 1, Jerome Le Breto Notary at Paris (Superior Council of the Bodu of Notaries), Etienne Picard, Profess at the University of Paris 1, Dominique Rousseau, Professor at the University Montpellier, Aliette·Voinnesson, Assistant Secretarty-General of the Society Comparative Legislation.
2. Besides Professor Koul, the Indian delegation included Mr. D.S. Mohil, the Direct of the Indian Society of International Law, and Secretary-General Professor V.S. Ma

91-D imposes certain restrictions on trade between States. The Indian Government has tried to liberalise trade with Article 394 changed with the execution of Articles 1 and 2 of GATT. Freedom in trade and investments is exclusively governed by the Central Laws.

As far as industry is concerned, the Union Parliament has the executive power. Since 1981, more than 90% of the industries are controlled by the State, and less than 5% are in the hands of private investors. The legislation of the Union and of the States need to be harmonised and co-ordinated to enable development of trade. If in the beginning there was no place for private investments, the States have by now got considerable autonomy. Economic and social planning does not necessarily mean 'Socialist' planning, and that is what gives importance to freedom in trade. Actually, with the exception of some sectors of general interest, such as the railways or shipyards, which fall within the jurisdiction of the State, there exists, however, enough possibility for participation of the private sector.

The second working session was devoted to "Freedom in Public Law". Mr. K.K. Venugopal, a Senior Advocate of Supreme Court of India and President of the International Union of Advocates, first of all dealt with the concept of "Freedom under the Indian Constitutional Law". India was the first country to achieve independence in the Afro-Asian group. On 26th January 1950, India became a republic, having already achieved its independence on 15th August 1947. The Constitution of India1950 bestows on the individuals fundamental freedoms in the widest possible manner. Democracy in India has developed inspite of poverty, illiteracy and diversity of languages and religions, and this in great part was due to the influence of the media and more particularly of the Press.

The right of prime importance is the right to life and personal liberty under Article 21 of the Constitution. The first draft of the Constitution incorporated the expression "due process of law" following the American Model. However, the Constituent Assembly quickly changed it to 'procedure established by law" in order to allow more freedom of action for the legislature. Under the Constitution, the courts have the power to declare null and void any 'bad' law. On the other hand, if a cruel and inhuman sanction had been stipulated in a law, the judiciary would have been powerless in terms of the phraseology of Article 21. Mr. Venugopal gave an example of the first constitutional case, that of the detention of a communist leader.[3] If the text was interpreted as per the meaning of "due process of law" this decision of detention would have been set aside. It took 28 years for the Government to review it. In 1978, the Supreme Court declared that in its opinion it was not appropriate to read the Constitution

3. *A.K. Gopalan* Vs. *Union of India,* AIR 1950 SC pp. 27.

in a mechanical way, and an unjust law had to be declared void, in of Article 21.[4]

During the first years after India became independent, the new so Government was not ready to confront the Judiciary, nor was the active enough. The Socialist programme was included in the Constit However, things changed in the 70's when Prime Minister Mrs. I Gandhi declared a State of Emergency in 1975. Most of the free granted under the Constitution were suspended, these included the rig move the court. It was then that the lawyers and judges took upon thems the task of ensuring that India remains a democracy. The courts wer only possible recourse. The battle was indeed very long drawn becaus judges had felt powerless under the earlier dispensation. References made to judgments of the Privy Council which stated that at common no British subject could be deprived of his freedom. The lesson drawn this period was that the Supreme Court took the decision that it would n find itself in a state of dependence *vis-a-vis* the Government and contributed to the widening of the fundamental rights.

The application of fundamental rights relating to food, shel employment and education is very difficult in India because of the p economic conditions. In spite of all this, the Supreme Court thought these rights would have to be granted and Article 21 incorporated them part of the right to life i.e., the right to live with dignity.[5]

The next step was to draw the attention of citizens on the possibili of public interest litigation. The poor and the illiterate, who have no acc to courts, can now be represented by third persons before these tribun New types of action have appeared: action in public interest, judi assistance, collection of evidence, etc. The Government had to coope and this enabled the promulgation of new laws. Some of the detent norms were considered to be unconstitutional (isolation, torture). As the environment problems (pollution, deprivation of rights) advoca voluntarily assist the plaintiffs.

Nevertheless, the great difficulty of India resides in the fact that it country of more than 900 million of inhabitants, where 40% of the popula lives below the poverty line and well below illiteracy line. That is the ex of deprivation of economic freedoms.

Mr. Etienne Picard presented his paper on "Freedom in French pu law" by pointing out that in French there is only one word for "Freed i.e., freedom and not two words as in English: liberty and freedom. stated that in his country most representative fundamental principle is

4. *Maneka Gandhi* Vs. *Union of India*, AIR 1978 PP 597.
5. *Azad Rickshaw Pullers Union* Vs. *State, 1980* Supp. SCC 601.

of equality. He examined first the principle of freedom in the French Constitution by presenting its ideological and political context, then he introduced different basic texts, before expounding their application in the jurisprudence of the Constitutional Council. This jurisprudence has been established in France very late, but since its institution in 1958, its role has not ceased to increase due to the fact that it has gradually widened its span of control, especially ensuring respect for fundamental rights, for the law maker.

However, the principle of liberty or freedom has certain restrictions due to, first of all, internal considerations: because of relativity of freedom itself and of law and order; and secondly due to external considerations: because of other rights (particularly, economic and social rights) and the requirements of general community interest.

Professor Dominique Rosseau presented his paper on "Municipal liberties (powers of local authorities) and fundamental rights in France". He questioned if claiming right to the principle of free administration is not causing harm to fundamental rights, the onus falls on the lawmaker to harmonise these potential contradictions. Nevertheless, this conciliation is difficult because it entails a choice between the order of the structure of the State and the order of the State law. The Constitutional Council favours them by circumscribing the liberties of action of territorial organisations and by subjecting them to general respect for fundamental rights.

In his presentation, Mr. Rousseau examined in the first place the problem of territorial organisations restricted in their freedom to act; they cannot establish themselves, they have no legislative power, the Constitutional Council does not accept the constitutional principle in respect of their contractual freedom; they have no financial power and cannot use any other language than French. Finally, some of the freedoms said to be conditioned are those that the Constitutional Council considers as necessary components of the principle of free administration.

The territorial organisations are located in a State without the need of sanction and are advised to respect fundamental rights, whether which results from their general mandate, it be for the freedom of education, right to judge, right to property, freedom of association, criminal justice rules, and assurances of local freedoms as well as social rights. Nevertheless, this jurisprudence of the Constitutional Council at times incites discussions. It seems to be a well accepted fact today that all organs of the State, including the law-maker, are duty bound to respect the Constitutional principles and rules.

A discussion followed at that point between various interveners. Prof. Mani observed that there seemed to be a similarity between the decision of

the Constitutional Council of 16th July 1971, and the fifth amendmen the American Constitution. Mr. Picard in his reply said that this deci was rather comparable to the judgment delivered by the Supreme Cour the United States in 1803, *Marbury versus Madison*; the two things in b the countries in question were considered to have consolidated the judi control of the constitutionality of laws thoroughly. He added, that t justified a role which the Preamble to the French Constitution had ne played, at least until 1971, a role equally important as that of the Americ Constitution and its amendments. This is more particularly related to t fact that the French Law, since 1789, depended entirely on the dogr according to which the law in general is held in the consolidated enactme and not in the Constitution unlike what the Americans held. Moreov France is a unitary and not a federal State; it never had the need, as t United States had to impose on local law-makers the unity of the Republ and, also the protection of the rights of States. Prof. Mani thought that t distinction between fundamental rights and local rights did not exist in t Indian system. Mr. Rousseau in his reply said that this was a new distincti in France, that fundamental rights are more important than local laws b in reality this is still at the level of discussion between theorists.

In his reply to another question raised by Professor Y.K. Tyagi c Jawaharlal Nehru University, on the importance of the Declaration of 178 and its influence and whether France itself was influenced by the nor western philosophies, Mr. Picard stated that France, indeed, did not seer to have ever been influenced by non-western countries in the matter c Human Rights. However, he added the French Society in general was no more open than it had been earlier to concepts more related to society an less to individuals in the matter of Human Rights. This could be explaine specially, by the relative influence of African cultures, well represented i France. But in the field of substantive law, this influence is very muc restricted. The societies and the minorities as such have no rights whic could be their own: only the man and the citizen have rights; for example Constitutional Council condemned the notion of "Zorsican people", as separate identity.

Mr. Venkatesh Rao, Advocate, Supreme Court of India, said that Indi has a parliamentary form of democracy which seems to lose its utility to th point that some parties advocate the establishment of a Presidential syster in India. He was afraid that the Presidential system might lead to dictatorship, and he wanted to know how this form of Government wa working in France. Professor Picard answered that, in the history of France there has been two instances of this type: at first, a very short trial o founding a Presidential regime in 1848, which was nipped in the bud i 1851 by a State *coup* that transformed the Republic into an Empire; the

another very different experience under the Fifth Republic. The Fifth Republic was entirely Parliamentary at the time of its inception in 1958; but the traditional Republicans dreaded, above all in 1962, when it was decided by referendum that the President of the Republic would be elected by direct universal franchise, whether it transformed into a Presidential regime and thus opened the way to adventures similar to those that had been deplored in the past. The follow up concerning the evolution of the regime showed that this one was rather of the Presidential type, because of the very strong powers it vested in the President. But, it certainly is not Presidential in the true sense of the word, ever since then that the Government is always answerable to Parliament. It is also evident from this evolution that the powers of the President, in reality seem to be less important as the latter does not have in Parliament the same political majority as that which supports the Government.

Mrs. Gore wanted to know if a private person could have recourse in the matter of fundamental rights to any tribunal or only to the Supreme Court. Mr. Venugopal in his reply said that a provision of the Constitution stipulates that Courts of Appeal and the Supreme Court have jurisdiction in these matters, then, he added that the Supreme Court has accepted the principles enunciated by the International Human Rights Conventions.

### B. Freedom in Economic Rights

The afternoon session was devoted to the study of "Freedom in economic rights" held under the chairmanship of Mr.B. Sen, Senior Advocate, Supreme Court, and Correspondent, UNIDROIT. He started by briefly relating the history of freedom of trade in India. Article 191-G stipulates the freedom in trade and business matters, and Article 298 of the Constitution confers on States of the Union the power to trade but according to certain rules. As a matter of fact, it is the State's monopoly and this state of affairs persists since 40 years and efforts made towards a free market for the time being do not seem to be conclusive.

The session is followed by interventions being made by practising Indian lawyers presenting — different aspects of economic freedom in India. Mr. Amir Z. Singh Pasrich, Advocate of International Law Associates, New Delhi, talked of the legal regime in the free market in India and added that a comparison with the French System is very difficult, as the Indian System is a mixture of the administrative law *a la franchise*, and of the British System of the "Judicial Review", without, however, establishing specialised tribunals. In the first place, he spoke of the important Indian texts concerning international trade. Then he passed upon the evolution of the law through the latter texts of 1998, and more particularly the Foreign Exchange Management Bill, 1998 (FEMA) currently before the Indian

Parliament. Following the deregulation, it now seems to replace "con by "management" of the international trade, and this evolution appea be irreversible, although the Indian States wish to exercise control in field.

In conclusion, Mr. Pasrich insisted on the need for evolution of economic system towards a free market in India and asked himself whe the Indian Government is ready to face world-wide exchanges and giv easily its protoectionist system.

Mr. Sen added that new sectors are opening to swaps. Earlier, all imp had to pass through Agencies, at the present their importance is decrea and India is tilted towards the liberalisation of international trade.

Ms. Amrita Mitra, of the Coopers-Lybrand/Price Waterhouse, infor the participants about the advance towards the free market in the fiel customs duty. A free market means an economy where the interventio the State is reduced. India, one of the Founder States of GATT, ha different structure relating to tariffs. Ms. Mitra rapidly went through anti -dumping laws, the safeguards, taxes on sales of goods that vary fr one State of the Union to another and differ from goods to goods. T development of free trade will allow India to participate in internationalisation, but goods and services would have to have a free e from India. Subsidised programmes by the State (DEP Programmes) are obstacle in the payment of other duties. As a matter of fact, gains fr exports are exempt from taxes on the income (which is not equivalent a subsidy) by liberalising imports and exports all goods are not check with the exception of some prohibited goods or those goods havi restricted circulation.

Mrs. Laurence Idot, Professor at the University of Paris-I, dealt w "Freedom of competition in France". Although the expression of freed of competition is at times used by the French State Council, it is diffic to admit that there exists a freedom in this field. It would be more corr to speak of the principle of competition or of the policy of competition. any event, one cannot argue solely within the French framework becau the matter is greatly influenced by the Community Law.

First of all, Prof. Idot was of the view that the existence of a princi of free competition can be deduced a *"contrario"* simply due to the f that the practices/rules which vitiate competition are prohibited. The freed of competition is thus protected by a body of rules which are amalgama under the trade name 'right of competition'. The system of protection is much more efficacious as the two sets of rules that co-exist in France, French rules as they are now established under the Ordinance of December 1986 modified by the Law of 1st July 1996, and the Commun

Rules derived from constitutive treaties and completed by derivative law texts, the most important of which is the regulation of 20th December 1989 control of merger?

The control of anti-competitive practices is historically the oldest framework of European competition laws. Whether one talks of substantive rules or of rules of procedure concerning application, one has in recent years witnessed a considerable extension of checks and controls. But research concerning maintenance of competitive structures is the most innovating and the most important component of the policy of collective competition and of French competition. This objective is the most sought after through and through, on the one hand, in respect of merger control that has been generalised at the French and at the Community levels since the beginning of the 90's and on the other hand, by application of various rules designed to offer equal chances to competitors. As the provisions concerning competence of open markets are the oldest, one now has to equally take into account the rules relating to State help (Articles 92 to 94 CR) as well as of principles enshrined in the texts of derivative Community Law relating to opening of some sectors to competition (Principle of dividing functions of governor and operator, that governing accounts indeed organic matters, and connection in diversification hypothesis).

By contrast, it may be possible to speak in France about the principle of free competition, about the right to competition and also about the policy of competition, but it seems difficult to accept the existence of freedom of competition, for two reasons. On the one hand, the principle of free competition is well contoured both because of restrictions ensuing from regulations concerning access to market; as well as because of prohibition of excessive anti-competitive behaviour, on the other hand, the protection of the principle assured by the right to competition is restricted because of the finalities as well as of the modalities of the system.

Dr. Biswajit Bhattacharyya, Advocate, Supreme Court of Delhi, presented the new Bill which seeks to put in place the Foreign Exchange Management Act (FEMA). Only some modifications of the law have been made as far as the title of offences is concerned and which in this case are now civil offences. But the disparity in the definitions is obvious, for example, in that of a 'resident'. No resident in India can transfer goods outside India, that involve direct consequences for the subsidiaries. This provision is not in the best interest of the country. In the same vein, Article 6 of the Bill prohibits each resident to issue or negotiate foreign claims; non-residents in India cannot have property in India. According to Article 39 of the Bill, the text is complemented by the Prevention of Money Laundering Bill and the Director of Police as the competent authority will become the most powerful person in the police service of the country. This

policy shall apply to India as well as to foreign associates. According Bhattacharyya, the bill was seriously planned and must be modified adoption by Parliament. Mr. Sen, Chairman, added in lighter vein th Government is inclined towards liberalisation of trade but the unwield of democracy puts a brake on the advances.

### C. Freedom of Trade

The second part of the afternoon session was devoted to prob arising from the freedom in trade and regulations governing moveme goods, services and funds. The first interveners, Messers Mukesh Bh and Prasanth Deshpande from the Office of Arthur Andersen & Associ who dealt with freedom in international trade, with the help of sl described its various aspects—international trade, national tr movements of funds, and also WTO. They presented India's position *a-vis* the WTO of which it is one of the Founder Members, and n particularly in respect of agriculture, textiles and intellectual prope Finally, India has a set of rules governing international trade, it imp taxes on imports and exports, taxes that hit goods at all levels, hav disorderly effect and grant supporting subsidies for exports. presentation concluded by pointing out regulations governing sc financial institutions, the Reserve Bank of India, stock-market and fore exchange institutions. The insurance services are nationalised and regul by the Insurance Act of 1938, and tariffs are under the control of a spe committee. However, the Malhotra Committee has presented a draft privatisation of insurances separating life insurances from other insuran demanding a minimum capital, amongst other proposals.

Ms. Tamali Sen Gupta, an Advocate, spoke about problems internationalisation *via* modern means of communication. According her, the evolution towards freedom of transfer of goods and service irreversible. It is difficult to make out the origin of fax or E-mails, contracts thus become oral contracts. Electronic communications are biggest challenge faced by various judicial systems. Services are alre available but the problem is that of modes of payment. She feels that Indian Government is not active enough in this field.

Professor Patrick Daillier of the Paris University, in his interventi spoke about the "Freedom of movement in the European Union". Europ integration cannot really be considered as a model because it is too m tied down to some properties of the countries in question; it only enal us to learn from its experience. Although, different countries of the Europ Union do not question the freedom of movement, they wish to have sc control on this process and this explains the differences in the evolution European integration.

As for the free movement of goods, it cannot be achieved by the simple abolition of tariff walls. This inter-Community movement calls for a common external tariff and trade policy. And even if the principle is firmly established, some compromises would have to be made with the national autonomy. Nonetheless, a merger between the abolition of tariff walls and a true common market is far from being achieved. This is due to the 'negative ntegration' in the evolution towards a 'positive integration', owing to certain national measures objectively justified as indispensable to safeguard mportant interests in various special stakes, such as the protection of ndustrial property for example. It is essential to prepare complementary texts, because jurisprudential compromise between the existence and the exercise of these rights is not satisfactory.

On the question of free movement of persons, it would be appropriate, first of all, to define those who are interested. Various provisions stipulate that these persons should be citizens of a Member State. The approach towards this problem is not only to be economic, it has also to be political: professional qualifications and equivalence of diplomas, problems relating to public work and activities in keeping with the exercise of public authorities. This point was illustrated with several examples. Finally, a brief mention of the movement of financial services and transfer of funds was made. Professor Daillier concluded his presentation by stating that the ssue of freedom of movement in the European Union was a very complex process where problems have to be solved as the evolution proceeds.

In her conclusion Professor Mrs. S.K. Verma, Director of the Indian Law Institute, and Ex-Dean, Faculty of Law, University of Delhi, made some observations on some aspects of international trade law, as a precise enough picture of the Indian panorama had been furnished by various ntervenees. India is a signatory to numerous multilateral agreements on nvestments and it intends to perceive multilateral co-operation in the field of technology. Mrs. Verma felt that it would be preferable for the country to adopt a law on competition in preference to multilateral agreements. Moreover, the developed countries willingly offer their know-how to India, as they would be needing this country as a potential client.

# JUDICIAL DECISIONS

## INTERNATIONAL

## INTERNATIONAL COURT OF JUSTICE

### 2 June 1999

### Case Concerning Legality of Use of Force

### (Yugoslavia v. United States of America)*

### Request for the Indication of Provisional Measures**

*Status of the ICJ, Article 41 read with Rules of Court, Rule 7 Jurisdiction of the Court, Article IX of the Genocide Convention, 194*

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* *Source* : Mimeographed order of the ICJ.

** Editorial Comment. On 29 April 1999, Yugoslavia filed with the ICJ ten sep applications instituting proceedings against the United States of America, the U Kingdom, Spain, Portugal, the Netherlands, Italy, Germany, France, Canada Belgium, "for violation of the obligation not to use force." Immediately after f these applications, Yugoslavia also submitted, in each case, a request for the indic of provisional measures pursuant to Article 73 of the Rules of Court (and Ar 41 of its Statute), whereby the Court was asked to indicate to each of the respondent states that it "shall cease immediately the acts of use of force and refrain from any act of threat or use of force against the Federal Republi Yugoslavia."

On 2 June 1999, the Court gave its individual orders on these requests for indic of provisional measures, separately on all the ten requests. For paucity of space are reproducing here only one such order, and have arbitrarily picked up the Co order in the case of *Yugoslavia* v. *United States of America*.

All the orders are not exactly identical. They cannot be, because of the varianc the jurisdictional bases as also some base issues of admissibility.

In the case against USA and Spain, the Court rejected the Yugslov request provisional measures on the ground of "manifest lack of jurisdiction". Wherea the cases against other eight respondent states, the Court's rejection is based finding of "lack of *prima facie* jurisdiction" as the Court is "not in a position to at *this stage of the proceedings*, that the acts imputed by Yugoslavia to the Respon are capable of coming within the provisions of the Genocide Convention; and w as Article IX of the Convention, invoked by Yugoslavia cannot accordingly const a basis on which the jurisdiction of the Court could *prima facie* be founded in case" (See, para 36 of the Court's Order in the case of *Yugoslavia* v. *United King* emphasis added. See also paras 44 and 40 in the case against Netherlands; para and 28 in the case against Italy as also in the cases against Germany and Fra paras 45 and 41 in the case against Canada). In all these eight cases, where the C does not *prima facie* find jurisdiction, there will indeed be a separate jurisdicti phase, should the parties decide not to withdraw or terminate the proceeding The reader is well advised against assuming that the arguments of parties anc Court's reasoning in these separate orders were identical.

*U.S. reservation thereto — Absence of objection by Yugoslavia to US reservation — Held that the Court manifestly lacks jurisdiction to entertain Yugoslavia's application instituting proceedings in the case, and that it cannot therefore issue any provisional measures whatsoever, or maintain the case on its General List.*

## ORDER

*Present:* *Vice-President* WEERAMANTRY, *Acting President*; *President* SCHWEBEL; *Judges* ODA, BEDJAOUI, GUILLAUME, RANJEVA, HERCZEGH, SHI, FLEISCHHAUER, KOROMA, VERESHCHETIN, HIGGINGS, PARRA-ARANGUREN, KOOIJMANS; *Judge* AD HOC KRECA; *Registrar* VALENCIA-OSPINA.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court and to Articles 73 and 74 of the Rules of Court,

Having regard to the Application by the Federal Republic of Yugoslavia (hereinafter "Yugoslavia") filed in the Registry of the Court on 29 April 1999, instituting proceedings against the United States of America (hereinafter "the United States") "for violation of the obligation not to use force",

*Makes the following Order:*

1. Whereas in that Application Yugoslavia defines the subject of the dispute as follows:

> "The subject-matter of the dispute are acts of the United States of America by which it has violated its international obligation banning the use of force against another State, the obligation not to intervene in the internal affairs of another State, the obligation not to violate the sovereignty of another State, the obligation to protect the civilian population and civilian objects in wartime, the obligation to protect the environment, the obligation relating to free navigation on international rivers, the obligation regarding fundamental human rights and freedoms, the obligation not to use prohibited weapons, the obligation not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group";

2. Whereas in the said Application Yugoslavia refers, as a basi the jurisdiction of the Court, to Article IX of the Convention or Prevention and Punishment of the Crime of Genocide, adopted by General Assembly of the United Nations on 9 December 1948 (herein the "Genocide Convention"), and to Article 38, paragraph 5, of the R of Court;

3. Whereas in its Application Yugoslavia states that the claims submi by it to the Court are based upon the following facts:

> "The Government of the United States of America, together with the Governments of other Member States of NATO, took part in the acts of use of force against the Federal Republic of Yugoslavia by taking part in bombing targets in the Federal Republic of Yugoslavia. In bombing the Federal Republic of Yugoslavia military and civilian targets were attacked. Great number of people were killed, including a great many civilians. Residential houses came under attack. Numerous dwellings were destroyed. Enormous damage was caused to schools, hospitals, radio and television stations, cultural and health institutions and to places of worship. A large number of bridges, roads and railway lines were destroyed. Attacks on oil refineries and chemical plants have had serious environmental effects on cities, towns and villages in the Federal Republic of Yugoslavia. The use of weapons containing depleted uranium is having far-reaching consequences for human life. The above-mentioned acts are deliberately creating conditions calculated at the physical destruction of an ethnic group, in whole or in part. The Government of the United States of America is taking part in the training, arming, financing, equipping and supplying the so-called 'Kosovo Liberation Army'";

and whereas it further states that the said claims are based on the followi legal grounds:

"The above acts of the Government of the United States of Ameri represent a gross violation of the obligation not to use force against anoth State. By financing, arming, training and equipping the so-called 'Koso Liberation Army', support is given to terrorist groups and the secession movement in the territory of the Federal Republic of Yugoslavia in brea of the obligation not to intervene in the internal affairs of another State. addition, the provisions of the Geneva Convention of 1949 and of t Additional Protocol No. 1 of 1977 on the protection of civilians and civili objects in time of war have been violated. The obligation to protect t environment has also been breached. The destruction of bridges on t Danube is in contravention of the provisions of Article 1 of the 19

onvention on free navigation on the Danube. The provisions of the ternational Covenant on Civil and Political Rights and of the International ovenant on Economic, Social and Cultural Rights of 1966 have also been eached. Furthermore, the obligation contained in the Convention on the revention and Punishment of the Crime of Genocide not to impose liberately on a national group conditions of life calculated to bring about e physical desertion of the group has been breached. Furthermore, the tivities in which the United States of America is taking part are contrary Article 53, paragraph 1, of the Charter of the United Nations";

4. Whereas the claims of Yugoslavia are formulated as follows in the pplication:

"The Government of the Federal Republic of Yugoslavia requests the ternational Court of Justice to adjudge and declare:

- by taking part in the bombing of the territory of the Federal Republic of Yugoslavia, the United States of America has acted against the Federal Republic of Yugoslavia in breach of its obligation not to use force against another State;
- by taking part in the training, arming, financing, equipping and supplying terrorist groups, i.e. the so-called 'Kosovo Liberation Army', the United States of America has acted against the Federal Republic of Yugoslavia in breach of its obligation not to intervene in the affairs of another State;
- by taking part in attacks on civilian targets, the United States of America has acted against the Federal Republic of Yugoslavia in breach of its obligation to spare the civilian population, civilians and civilian objects;
- by taking part in destroying or damaging monasteries, monuments of culture, the United States of America has acted against the Federal Republic of Yugoslavia in breach of its obligation not to commit any act of hostility directed against historical monuments, works of art of places of worship which constitute cultural or spiritual heritage of people;
- by taking part in the use of cluster bombs, the United States of America has acted against the Federal Republic of Yugoslavia in breach of its obligation not to use prohibited weapons, i.e. weapons calculated to cause unnecessary suffering;
- by taking part in the bombing of oil refineries and chemical plants, the United States of America has acted against the Federal Republic of Yugoslavia in breach of its obligation not to cause considerable environmental damage;

- by taking part in the use of weapons containing depleted uran the United States of America has acted against the Federal Rep of Yugoslavia in breach of its obligation not to use prohi weapons and not to cause far-reaching health and environm damage;
- by taking part in killing civilians, destroying enterpr communications, health and cultural institutions, the United S of America has acted against the Federal Republic of Yugos in breach of its obligation to respect the right to life, the rig work, the right to information, the right to health care as we other basic human rights;
- by taking part in destroying bridges on international rivers, United States of America has acted against the Federal Republi Yugoslavia in breach of its obligation to respect freedom navigation on international rivers;
- by taking part in activities listed above, and in particular by cau enormous environmental damage and by using depleted urani the United States of America has acted against the Federal Repu of Yugoslavia in breach of its obligation not to deliberately inf on a national group conditions of life calculated to bring about physical destruction, in whole or in part;
- the United States of America is responsible for the violation of above international obligations;
- the United States of America is obliged to stop immediately violation of the above obligations *vis-a-vis* the Federal Republic Yugoslavia;
- the United States of America is obliged to provide compensat for the damage done to the Federal Republic of Yugoslavia and this citizens and juridical persons";

and whereas, at the end of its Application, Yugoslavia reserves the righ amend and supplement it;

5. Whereas on 29 April 1999, immediately after filing its Applicati Yugoslavia also submitted a request for the indication of provisio measures pursuant to Article 73 of the Rules of Court; and whereas t request was accompanied by a volume of photographic annexes produ as "evidence";

6. Whereas, in support of its request for the indication of provisio measures, Yugoslavia contends *inter alia* that, since the onset of bombing of its territory, and as a result thereof, about 1,000 civilia including 19 children, have been killed and more than 4,500 have sustai serious injuries; that the lives of three million children are endangered; t

hundreds of thousands of citizens have been exposed to poisonous gases; that about one million citizens are short of water supply; that about 500,000 workers have become jobless; that two million citizens have no means of livelihood and are unable to ensure minimum means of sustenance; and that the road and railway network has suffered extensive destruction; whereas, in its request for the indication of provisional mesures, Yugoslavia also lists the targets alleged to have come under attack in the air strikes and describes in detail the damage alleged to have been inflicted upon them (bridges, railway lines and stations, roads and means of transport, airports, industry and trade, refineries and warehouses storing liquid raw materials and chemicals, agriculture, hospitals and health care centres, schools, public buildings and housing facilities, infrastructure, telecommunications, cultural-historical monuments and religious shrines); and whereas Yugoslavia concludes from this that:

> "The acts decribed above caused death, physical and mental harm to the population of the Federal Republic of Yugoslavia; huge devastation; heavy pollution of the environment, so that the Yugoslav population is deliberately imposed conditions of life calculated to bring about physical destruction of the group, in whole or in part";

7. Whereas, at the end of its request for the indication of provisional measures, Yugoslavia states that

> "If the proposed measure were not to be adopted, there will be new losses of human life, further physical and mental harm inflicted on the population of the FR of Yugoslavia, further destruction of civilian targets, heavy environmental pollution and further physical destruction of the people of Yugoslavia";

and whereas, while reserving the right to amend and supplement its request, Yugoslavia requests the Court to indicate the following measures:

> "The United States of America shall cease immediately its acts of use of force and shall refrain from any act of threat or use of force against the Federal Republic of Yugoslavia";

8. Whereas the request for the indication of provisional measures was accompanied by a letter from the Agent of Yugoslavia, addressed to the President and Members of the Court, which read as follows:

> "I have the honour to bring to the attention of the Court the latest bombing of the central area of the town of Surdulica on 27 April, 1999 at noon resulting in losses of lives of civilians, most of whom

were children and women, and to remind of killings of peoples in Kursumlija, Aleksinac and Cuprija, as well as bombing of a refugee convoy and the Radio and Television of Serbia, just to mention some of the well-known atrocities. Therefore, I would like to caution the Court that there is a highest probability of further civilian and military casualties.

Considering the power conferred upon the Court by Article 75, paragraph 1, of the Rules of Court and having in mind the greatest urgency caused by the circumstances described in the Requests for provisional measure of protection I kindly ask the Court to decide on the submitted Requests *proprio motu* or to fix a date for a hearing at earliest possible time";

9. Whereas on 29 April 1999, the day on which the Application and th request for the indication of provisional measures were filed in the Registry the Registrar sent to the United States Government signed copies of th Application and of the request, in accordance with Article 38, paragrap 4, and Article 73, paragraph 2, of the Rules of Court; and whereas he als sent to that Government copies of the documents accompanying th Application and the request for the indication of provisional measures;

10. Whereas on 29 April 1999 the Registrar informed the parties tha the Court had decided, pursuant to Article 74, paragraph 3, of the Rules o Court, to hold hearings on 10 and 11 May 1999, where they would be abl to present their observations on the request for the indication of provisiona measures;

11. Whereas, pending the notification under Article 40, paragraph 3 of the Statute and Article 42 of the Rules of Court, by transmittal of the printed bilingual text of the Application to the Members of the Unitec Nations and other States entitled to appear before the Court, the Registrar on 29 April 1999 informed those States of the filing of the Application anc of its subject-matter, and of the filing of the request for the indication o provisional measures;

12. Whereas, since the Court includes upon the bench no judge o Yugoslav nationality, the Yougoslav Government has availed itself of the provisions of Article 31 of the Statute of the Court to choose Mr. Milenkc Kreca to sit as judge *ad hoc* in the case; and whereas no objection to tha choice was raised within the time-limit fixed for the purpose pursuant tc Article 35, paragraph 3, of the Rules of Court;

13. Whereas, at the public hearings held between 10 and 12 May 1999 oral observations on the request for the indication of provisional measures were presented by the following:

*On behalf of Yugoslavia:*

Mr. Rodoljub Etinski, *Agent*,
Mr. Ian Brownlie,
Mr. Paul J. I.M. de Waart,
Mr. Eric Suy,
Mr. Miodrag Mitić,
Mr. Olivier Corten;

*On behalf of the United States:*

Mr. David Andrews, *Agent*;
Mr. John Crook,
Mr. Michael Matheson;

14. Whereas, in this phase of the proceedings, the parties presented the following submissions:

*On behalf of Yugoslavia:*

> "[T]he Court [is asked] to indicate the following provisional measure:
>
> [T]he United States of America ... shall cease immediately the acts of use of force and shall refrain from any act of threat or use of force against the Federal Republic of Yugoslavia";

*On behalf of the United States of America:*

"That the Court reject the request of the Federal Republic of Yugoslavia for the indication of provisional measures.";

15. Whereas the Court is deeply concerned with the human tragedy, the loss of life, and the enormous suffering in Kosovo which form the background of the present dispute, and with the continuing loss of life and human suffering in all parts of Yugoslavia;

16. Whereas the Court is profoundly concerned with the use of force in Yugoslavia; whereas under the present circumstances such use raises very serious issues of international law;

17. Whereas the Court is mindful of the purposes and principles of the United Nations Charter and of its own responsibilities in the maintenance of peace and security under the Charter and the Statute of the Court;

18. Whereas the Court deems it necessary to emphasize that all pa appearing before it must act in conformity with their obligations unde United Nations Charter and other rules of international law, inclu humanitarian law;

19. Whereas the Court, under its Statute, does not automatically jurisdiction over legal disputes between States parties to that Statut between other States to whom access to the Court has been granted; whe the Court has repeatedly stated "that one of the fundamental principle its Statute is that it cannot decide a dispute between States without consent of those States to its jurisdiction" (*East Timor, Judgment, I. Reports 1995*, p. 101, para. 26); and whereas the Court can there exercise jurisdiction only between States parties to a dispute who not have access to the Court but also have accepted the jurisdiction of Court, either in general form or for the individual dispute concerned

20. Whereas on a request for provisional measures the Court need before deciding whether or not to indicate them, finally satisfy itself it has jurisdiction on the merits of the case, yet it ought not to indicate s measures unless the provisions invoked by the applicant appear, *pri facie*, to afford a basis on which the jurisdiction of the Court might established;

21. Whereas in its Application Yugoslavia claims, in the first place found the jurisdiction of the Court upon Article IX of the Genoc Convention, which provides:

> "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute";

whereas it is not disputed that both Yugoslavia and the United States parties to the Genocide Convention; but whereas, when the United Sta ratified the Convention on 25 November 1988, it made the follow reservation:

> "That with reference to Article IX of the Convention, before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this Article, the specific consent of the United States is required in each case.";

22. Whereas the United States contends that "[its] reservation [to Arti IX] is clear and unambigous"; that "[t]he United States has not given

specific consent [that reservation] requires [and] ... will not do so"; and that Article IX of the Convention cannot in consequence found the jurisdiction of the Court in this case, even *prima facie*; whereas the United States also observed that reservations to the Genocide Convention are generally permitted; that its reservation to Article IX is not contrary to the Convention's object and purpose; and that, "[s]ince ... Yugoslavia did not object to the ... reservation, [it] is bound by it"; and whereas the United States further contends that there is no "legally sufficient... connection between the charges against the United States contained in the Application and [the] supposed jurisdictional basis under the Genocide Convention"; and whereas the United States further asserts that Yugoslavia has failed to make any credible allegation of violation of the Genocide Convention, by failing to demonstrate the existence of the specific intent required by the Convention to "destroy, in whole or in part, a national, ethnical, racial or religious group, as such", which intent could not be inferred from the conduct of conventional military operations against another State.

23. Whereas Yugoslavia disputed the United States interpretation of the Genocide Convention, but submitted no argument concerning the United States reservation to Article IX of the Convention;

24. Whereas the Genocide Convention does not prohibit reservations; whereas Yugoslavia did not object to the United States reservation to Article IX; and whereas the said reservation had the effect of excluding that Article from the provisions of the Convention in force between the Parties;

25. Whereas in consequence Article IX of the Genocide Convention cannot found the jurisdiction of the Court to entertain a dispute between Yugoslavia and the United States alleged to fall within its provisions; and whereas that Article manifestly does not constitute a basis of jurisdiction in the present case, even *prima facie*;

26. Whereas in its Application Yugoslavia claims, in the second place, to found the jurisdiction of the Court on Article 38, paragraph 5, of the Rules of Court, which reads as follows:

> "5. When the applicant State proposes to found the jurisdiction of the Court upon a consent thereto yet to be given or manifested by the State against which such application is made, the application shall be transmitted to that State. It shall not however be entered in the General List, nor any action be taken in the proceedings, unless and until the State against which such application is made consents to the Court's jurisdiction for the purposes of the case";

27. Whereas the United States observes that it "has not consented to jurisdiction under Article 38, paragraph 5, [of the Rules of Court] and will not do so";

28. Whereas it is quite clear that, in the absence of consent by United States, given pursuant to Article 38, paragraph 5, of the Rules Court cannot exercise jurisdiction in the present case, even *prima fa*

29. Whereas it follows from what has been said above that the C manifestly lacks jurisdiction to entertain Yugoslavia's Application; whe it cannot therefore indicate any provisional measure whatsoever in o to protect the rights invoked therein; and whereas, within a system consensual jurisdiction, to maintain on the General List a case upon w it appears certain that the Court will not be able to adjudicate on the me would most assuredly not contribute to the sound administration of just

30. Whereas there is a fundamental distinction between the questio the acceptance by a State of the Court's jurisdiction and the compatibi of particular acts with international law; the former requires consent; latter question can only be reached when the Court deals with the me after having established its jurisdiction and having heard full legal argume by both parties;

31. Whereas, whether or not States accept the jurisdiction of the Co they remain in any event responsible for acts attributable to them t violate international law, including humanitarian law; whereas any dispu relating to the legality of such acts are required to be resolved by peace means, the choice of which, pursuant to Article 33 of the Charter, is left the parties;

32. Whereas in this context the parties should take care not to aggrav or extend the dispute;

33. Whereas, when such a dispute gives rise to a threat to the pea breach of the peace or act of aggression, the Security Council has spec responsibilities under Chapter VII of the Charter;

34. For these reasons,

THE COURT,

(1) By twelve votes to three,

*Rejects* the request for the indication of provisional measures submitt by the Federal Republic of Yugoslavia on 29 April 1999;

IN FAVOUR: *Vice-President* Weeramantry, *Acting President; Preside* Schwebel; *Judges* Oda, Bedjaoui, Guillaume, Ranje Herczegh, Fleischhauer, Koroma, Higgins, Parra-Arangur Kooijmans;

AGAINST: *Judges* Shi, Vereshchetin; *Judge* ad hoc Kreća;

(2) By twelve votes to three,

*Orders* that the case be removed from the List.

IN FAVOUR: *Vice-President* Weeramantry, *Acting President; President* Schwebel; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Higgins, Kooijmans;

AGAINST: *Judges* Vereshchetin, Parra-Aranguren; *Judge* ad hoc Kreća.

Done in English and in French, the French text being authoritative, at the Peace Palace, The Hague, this second day of June, one thousand nine hundred and ninety-nine, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Federal Republic of Yugoslavia and the Government of the United States of America, respectively.

(*Signed*) Christopher G. Weeramantry,
Vice-President.

(*Signed*) Eduardo Valencia-Ospina,
Registrar.

Judges SHI, KOROMA and VERESHCHETIN append declarations to the Order of the Court.*

Judges ODA and PARRA-ARANGUREN append separate opinions to the Order of the Court.*

Judge *ad hoc* KRECA appends a dissenting opinion to the Order of the Court.*

(Initialled) C.G.W.

(Initialled) E.V.O.

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* These have been omitted in this reproduction.

# SELECT RESOLUTIONS ADOPTED BY THE GENERAL ASSEMBLY DURING ITS FIFTY-SECOND AND FIFTY-THIRD SESSIONS, 1998

## 1. Necessity of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba*

The General Assembly,

*Determined* to encourage strict compliance with the purposes principles enshrined in the Charter of the United Nations,

*Reaffirming*, among other principles, the sovereign equality of Sta non-intervention and non-interference in their internal affairs and freed of international trade and navigation, which are also enshrined in m international legal instruments,

*Recalling* the statements of the heads of States or Government at Ibero-American Summits concerning the need to eliminate the unilate application of economic and trade measures by one State against anot that affect the free flow of international trade,

*Concerned* about the continued promulgation and application Member States of laws and regulations, such as that promulgated on March 1996 known as the "Helms-Burton Act", the extraterritorial effe of which affect the sovereignty of other States, the legitimate interests entities or persons under their jurisdiction and the freedom of trade navigation,

*Taking note* of declarations and resolutions and resolutions of differ intergovernmental forums, bodies and Governments that express rejection by the international community and public opinion of promulgation and application of regulations of the kind referred to abo

*Recalling* its resolutions 47/19 of 24 November 1992, 48/16 o November 1993, 49/9 of 26 October 1994, 50/10 of 2 November 1995, 17 of 12 November 1996 and 52/10 of 5 November 1997,

*Concerned* that, since the adoption of its resolutions 47/19, 48/16, 9, 50/10, 51/17 and 52/10, further measures of that nature aimed strengthening and extending the economic, commercial and financ embargo against Cuba continue to be promulgated and applied, a

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* Resolution 53/4 adopted on 14 October 1998 with a vote 157-2-12.

ncerned also about the adverse effects of such measures on the Cuban tionals living in other countries,

1. *Takes note* of the report of the Secretary-General on the plementation of resolution 52/10;[1]

2. *Reiterates its call* on all States to refrain from promulgating and plying laws and measures of the kind referred to in the preamble to the esent resolution in conformity with their obligations under the Charter of e United Nations and international law, which, *inter alia*, reaffirmed the edom of trade and navigation;

3. *Once again urges* States that have and continue to apply such laws d measures to take the necessary steps to repeal or invalidate them as on as possible in accordance with their legal regime;

4. *Requests* the Secretary-General, in consultation with the appropriate gans and agencies of the United Nations system, to prepare a report on e implementation of the present resolution in the light of the purposes and inciples of the Charter and international law, and to submit it to the eneral Assembly at its fifty-fourth session;

5. *Decides* to include in the provisional agenda of its fifty-fourth ssion the item entitled "Necessity of ending the economic, commercial d financial embargo imposed by the United States of America against uba".

*If favour*: Afghanistan, Algeria, Andorra, Angola, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Bhutan, Bolivia, Botswana, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Burundi, Cameroon, Canada, Cape Verde, Central African Republic, Chad, Chile, China, Colombia, Comoros, Costa Rica, Cote d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic People's Republic of Korea, Democratic Republic of Congo, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Fiji, Finland, France, Gabon, Gambia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Hungary, Iceland, India, Indonesia, Iran, Ireland, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kyrgyzstan, Lao People's Democratic Republic, Lebanon, Lesotho, Libya, Liechtenstein, Luxembourg, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Mauritania, Mauritius, Mexico, Monaco,

A/53/320 and Add. 1-3.

Mongolia, Mozambique, Myanmar, Namibia, Netherlands, N
Zeland, Niger, Nigeria, Norway, Pakistan, Panama, Papua N
Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Qa
Republic of Moldova, Romania, Russian Federation, Rwanda, Sa
Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadir
Samoa, San Marino, Saudi Arabia, Seychelles, Sierra Leo
Singapore, Slovakia, Slovenia, Solomon Islands, South Afri
Spain, Sri Lanka, Sudan, Suriname, Swaziland, Sweden, Syr
Tajikistan, Thailand, Togo, Trinidad and Tobago, Tunisia, Turk
Turkmenistan, Uganda, Ukraine, United Arab Emirates, Unit
Kingdom, United Republic of Tanzania, Uruguay, Vanua
Venezuela, Vietnam, Yemen, Zambia, Zimbabwe.

*Against*: Israel, United States.

*Abstain*: El Salvador, Estonia, Georgia, Latvia, Lithuania, Mo Nepal, Nicaragua, Republic of Korea, Senegal, The former Yug Republic of Macedonia, Uzbekistan.

*Absent*: Albania, Federated States of Micronesia, Kuwait, Ma Islands, Oman, Palau.

## 2. Elimination of coercive economic measures as a means o political and economic compulsion*

*The General Assembly*,

*Guided* by the principles embodied in the Charter of the United Na particularly those that call for development of friendly relations a nations and the achievement of cooperation in solving problems economic and social character,

*Recalling* the numerous resolutions in which it has called upo international community to take urgent and effective steps to end coe economic measures,

*Recalling also* the final document of the Twelfth Conference of I of State or Government of the Movement of Non-Aligend Countries, reaffirmed that coercive economic measures and the enactme extraterritorial laws are incompatible with international law and the pur and principles of the Charter of the United Nations,

*Recalling further* the decision adopted by the Assembly of Hea State and Government of the Organization of African Unity at its t

* Resolution 53/10 adopted on 26 October 1998 with a vote 80-2-67.

ourth ordinary session,[1] in which it expresses concern at the continued mposition of extraterritorial coercive economic measures and demands he elimination of such measures,

*Taking into account* the final document of the eighth Islamic Summit, eld in Tehran,[2] which noted with grave concern that the extraterritorial pplication of domestic laws was having a negative impact on foreign nvestment in other States and rejected all coercive measurec aimed at Member States seeking to broaden the scope of their economic cooperation nd trade,

*Deeply concerned* that Member States are continuing to apply xtraterritorial coercive economic laws in violation of the norms of nternational law and the purposes and principles of the United Nations,

*Believing* that the prompt elimination of such measures would be onsistent with the purposes and principles of the Charter of the United Nations and the relevant rules of the World Trade Organization,

*Recalling* its resolution 51/22 of 27 November 1996,

1. *Takes note* of the Secretary-General's report of 15 September 1997 on the implementation of resolution 51/22;[3]

2. *Reaffirms* the inalienable right of every State to seek economic and ocial development and to choose the political, economic and social system hat it deems most appropriate for the welfare of its people, in accordance with its national plans and policies;

3. *Expresses its deep concern* at the negative impact of unilaterally mposed extraterritorial coercive economic measures on trade and financial nd economic cooperation, including trade and cooperation at the regional evel, as well as the creation of serious obstacles to the free flow of trade nd capital at the regional and international levels;

4. *Reiterates its call for* the immediate repeal of unilateral xtraterritorial laws that impose sanctions on corporations and nationals of ther States;

5. *Again urges* all States not recognize or apply extraterritorial coercive conomic measures or legislative enactments unilaterally imposed by any State;

6. *Requests* the Secretary-General to submit to the General Assembly t its fifty-fifth session a report on the implementation of the present esolution;

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A/53/179.

A/53/72-S//1998/156; see *Official Records of the Security Council, Fifty-third Year, Supplement for January, February, and March 1998*, document S/1998/156

3. A/52/343 and Add. 1 and 2.

7. *Decides* to include in the provisional agenda on its fifty-fifth se the item entitled "Elimination of coercive economic measures as a n of political and economic compulsion".

*If favour*: Algeria, Angola, Botswana, Brunei Dar-Salam, Burkin Faso, Burundi, Cameroon, Cape Verde, Central African Republic Chad, China, Colombia, Cote d'Ivoire, Cuba, Democratic People' Republic of Korea, Democratic Republic of Congo, Djibouti, Egypt Equatorial, Guinea, Eritrea, Ethiopia, Fiji, Gabon, Gambia, Ghana Guinea, Guinea-Bissau, Guyana, India, Indonersia, Iran, Jamaica. Jordan Kenya, Kuwait, Lao People's Democratic Republic Lebanon, Libya, Madagascar, Malawi, Malaysia, Mali, Mauritania Mexico, Mongolia, Morocco, Mozambique, Myanmar, Namibia Niger, Nigeria, Oman, Pakistan, Philippines, Qatar, Russian Federation, Saudi Arabia, Senegal, Sierra Leone, Singapore, South Africa, Sri Lanka, Sudan, Suriname, Syria, Tajikistan, Thailand Togo, Tunisia, Turkey, Uganda, United Arab Emirates, United Republic of Tanzania, Venezuela, Vietnam, Yemen, Zambia, Zimbabwe.

*Against* : Isreal, United States.

Abstain : Andorra, Antigua-Barbuda, Argentina, Armenia, Australia, Austria, Barbados, Belarus, Belgium, Bhutan, Bolivia, Brazil, Bulgaria, Canada, Chile, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Ecuador, Estonia, Federated States of Micronesia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, Nepal, Netherlands, New Zealand, Norway, Panama, Paraguay, Peru, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, Saint Lucia, San Marino, Slovakia, Slovenia, Solomon Islands, Spain, Swaziland, Sweden, The Former Yugoslav Republic of Macedonia, Trinidad and Tobago, Ukraine, United Kingdom, Uruguay, Uzbekistan.

*Absent* : Afghanistan, Albania, Azerbaijan, Bahamas, Bangladesh, Belize, Bosnia and Herzegovina, Cambodia, Comoros, Congo, Dominica, Dominican Republic, EL Salvador, Grenada, Gautemala, Haiti, Honduras, Iraq, Lesotho, Liberia, Maldives, Marshall Islands, Mauritius, Nicaragua, Palau, Papua New Guinea, Rwanda, Saint Kitts and Neivis, Saint Vincent and the Grenadines, Samoa, Sao

Tome and Principe, Seychelles, Somalia, Turkmenistan, Vanuatu, Yugoslavia.

## 3. Oceans and the law of the sea*

*The General Assembly*

*Recalling* its resolutions 49/28 of 6 December 1994, 50/23 of 5 December 1995, 51/34 of 9 December 1996 and 52/26 of 26 November 1997 adopted subsequent to the entry into force of the United Nations Convention on the Law of the Sea[1] ("the Convention") on 16 November 1994,

*Recalling also* its resolution 2749 (XXV) of 17 December 1970, and considering that the Convention, together with the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 ("the Agreement),[2] provides the regime to be applied to the Area and its resources as defined in the Convention,

*Emphasizing* the universal character of the Convention and its fundamental importance for the maintenance and strengthening of international peace and security, as well as for the sustainable use and development of the seas and oceans and their resources,

*Conscious* that the problems of ocean space are closely interrelated and need to be considered as a whole,

*Noting with satisfaction* that oceans and seas will be the sectoral theme discussed at the seventh session of the Commission on Sustainable Development, in 1999,

*Reaffirming* the strategic importance of the Convention as a framework for national, regional and global action in the marine sector, as recognized also by the United Nations Conference on Environment and Development in chapter 17 of Agenda 21,[3] as well as in the Programme for the Further Implementation of Agenda 21, in particular paragraph 36 thereof dealing with oceans and seas,[4]

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* Resolution 53/32 adopted on 24 November1998 with a vote 134-1-6.

1. *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84. V.3), document A/Conf.62/122.

2. Resolution 48/263, annex.

3. *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992* (United Nations publication, Sales No. E. 93 I.8 and corrigenda), vol. I: *Resolutions adoped by the Conference*, resolution I, annex II

4. Resolution S-19/2, annex.

*Recalling* that, by its resolution 49/131 of 19 December 19 proclaimed 1998 the International Year of the Ocean,

*Noting with satisfaction* the increase in the number of States part the Convention and the Agreement,

*Recognizing* the impact on States of the entry into force of the Conve and the Agreement and the increasing need, particularly of develo States, for advice and assistance in their implementation in order to be thereunder,

*Taking note with concern* of the financial situation of the Internat Seabed Authority and of the International Tribunal for the Law of the

*Conscious* of the need to promote and facilitate internati cooperation, especially at the subregional and regional levels, in ord ensure the orderly and sustainable development of the uses and resou of the seas and oceans,

*Conscious also* of the importance of education and training in the of ocean affairs and the law of the sea,

*Taking account* of the importance of reliable hydrographic and nau information to enhance the safety of navigation,

*Expressing its concern* at the increasing threat to shipping from pi and armed robbery at sea and its appreciation and support for the ong work of the International Maritime Organization in this area,

*Expressing its appreciation once again* to the Secretary-General fo efforts in support of the Convention and in its effective implementat including providing assistance in the functioning of the institutions cre by the Convention,

*Noting* the responsibilities of the Secretary-General under Convention and related resolutions of the General Assembly, in partic resolutions 49/28 and 52/26, and emphasizing the importance of performance of such responsibilities for the effective and consis implementation of the Convention,

*Taking note* of the report of the Secretary-General,[1] and reaffirming importance of the annual consideration and review by the General Assen of the overall developments pertaining to the implementation of Convention, as well as of the developments relating to the law of the and ocean affairs,

1. *Calls upon* all States that have not done so, in order to achieve goal of universal participation, to become parties to the Convention and Agreement;

1. A/53/456.

2. *Reaffirms* the unified character of the Convention;

3. *Calls upon* States to harmonize as a matter of priority their national gislation with the provisions of the Convention, to ensure the consistent plication of those provisions and to ensure also that any declarations or tements that they have made or make when signing, ratifying or acceding e in conformity with the Convention and to withdraw any of their clarations or statements that are not in conformity;

4. *Encourages* States parties to the Convention to deposit with the cretary-General charts and lists of geographical coordinates, as provided r in the Convention;

5. *Requests* the Secretary-General to convene the Meeting of States rties to the Convention in New York from 19 to 28 May 1999, during hich, on 24 May 1999, the election of seven judges of the International ibunal for the Law of the Sea ("the Tribunal") will take place;

6. *Notes with satisfaction* that the dribunal, established in accordance th Annex VI to the Convention as a new means for the settlement of sputes concerning the interpretation or application of the Convention d the Agreement, delivered its first judgment on 4 December 1997;

7. *Encourages* States parties to the Convention to consider making a ritten declaration choosing from the means set out in article 287 of the onvention for the settlement of disputes concerning the interpretation or plication of the Convention and the Agreement, and invites States to te the provisions of Annexes V, VI, VII and VIII to the Convention ncerning, respectively, conciliation, the Tribunal, arbitration and special bitration;

8. *Requests* the Secretary-General to circulate lists of conciliators and bitrators drawn up and maintained in accordance with Annexes V and II to the Convention and to update these lists accordingly;

9. *Notes with satisfaction* the progress in the work of the International abed Authority ("the Authority"), and emphasizes the importance of ntinued progress towards the adoption of the regulations on prospecting d exploration for polymetallic nodules;

10. *Notes with appreciation* the adoption of the Agreement concerning e Relationship between the United Nations and the Authority and the greement on Cooperation and Relationship between the United Nations d the Tribunal;

11. *Appeals* to all members of the Authority and all States parties to the nvention to pay their assessed contributions to the Authority and to the ibunal, respectively, in full and on time in order to ensure that they are le to carry out their functions as provided for in the Convention;

12. *Notes with satisfaction* the progress in the work of the Comm on the Limits of the Continental Shelf ("the Commission") during its and fourth[2] sessions, held in May and August/September 1998, in ad its rules of procedure and in adopting provisionally its scientifi technical guidelines aimed at assisting States to prepare their submi regarding the outer limits of their continental shelf;

13. *Approves* the convening by the Secretary-General of the fift sixth sessions of the Commission in New York from 3 to 14 May and 30 August to 3 September 1999, respectively;

14. *Expresses its appreciation* to the Secretary-General for the a comprehensive report on oceans and the law of the sea and for the acti of the Division for Ocean Affairs and the Law of the Sea of the Offi Legal Affairs of the Secretariat, in accordance with the provisions o Convention and the mandate set forth in resolutions 49/28 and 52/2

15. *Requests* the Secretary-General to ensure that the institut capacity of the Organization adequately responds to the needs of St the newly established institutions under the Convention and o competent international organizations by providing advice and assista taking into account the special needs of developing countries;

16. *Also requests* the Secretary-General to continue to carry ou responsibilities entrusted to him in the Convention and related resolu of the General Assembly, including those mentioned in paragraph 1 resolution 52/26, and to ensure that the performance of such activiti not adversely affected by savings as may be realized under the appr budget for the Organization;

17. *Notes with appreciation* the continued efforts of the Divisior Ocean Affairs and the Law of the Sea to provide timely information or oceans, marine affairs and the law of the sea through its Web site or Internet;[3]

18. *Reaffirms* the importance of ensuring the uniform and consi application of the Convention and a coordinated approach to its ov implementation, and of strengthening technical cooperation and finar assistance for this purpose, stresses once again the continuing import of the efforts of the Secretary-General to these ends, and reiterate invitation to the competent international organizations and o international bodies to support these objectives;

1. CLCS/7.
2. CLCS/9.
3. www. un.org/Depts/los.

19. *Invites* Member States and others in a position to do so to contribute to the further development of the Hamilton Shirley Amerasinghe Memorial Fellowship Programme on the Law of the Sea established by the General Assembly in resolution 35/116 of 10 December 1980, and to support the training activities under the Train-Sea-Coast programme of the Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs;

20. *Notes with interest* the ongoing work of the United Nations Educational, Scientific and Cultural Organization towards a convention for the implementation of the provisions of the Convention, relating to the protection of the underwater cultural heritage, and stresses the importance of ensuring that the instrument to be elaborated is in full conformity with the relevant provisions of the Convention;

21. *Invites* States to cooperate in carrying out hydrographic surveys and nautical services for the purpose of ensuring safe navigation as well as to ensure the greatest uniformity in charts and nautical publications and to coordinate their activities so that hydrographic and nautical information is made available on a worldwide scale;

22. *Urges* all States, in particular coastal States in affected regions, to take all necessary and appropriate measures to prevent and combat incidents of piracy and armed robbery at sea and to investigate or cooperate in the investigation of such incidents wherever they occur and bring the alleged perpetrators to justice, in accordance with international law;

23. *Calls upon* States to cooperate fully with the International Maritime Organization to combat piracy and armed robbery against ships, including by submitting reports on incidents to that Organization;

24. *Takes note* of the work of the Independent World Commission on the Oceans, and of its report entitled *The Ocean... Our Future*, and welcomes its issuance in the context of the International Year of the Ocean;

25. *Reaffirms* its decision to undertake an annual review and evaluation of the implementation of the Convention and other developments relating to ocean affairs and the law of the sea;

26. *Reaffirms* also its decision, in resolution S-19/2 of 28 June 1997, to consider the results of the review by the Commission on Sustainable Development of the sectorial theme of oceans and seas in 1999, under its agenda item "Oceans and the law of the sea".

27. *Requests* the Secretary-General to report to the General Assembly at its fifty-fourth session on the implementation of the present resolution, including other developments and issues relating to ocean affairs and the law of the sea, in connection with his annual comprehensive report on oceans and the law of the sea, and to circulate the report sufficiently in advance of consideration by the General Assembly of the item concerning

oceans and the law of the sea;

*In favour*: Algeria, Andorra, Angola, Argentina, Armenia, Australia, Austria, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Benin, Bolivia, Botswana, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Cameroon, Canada, Chad, Chile, China, Costa Rica, Cote d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Egypt, Equatorial Guinea, Eritrea, Estonia, Ethiopia, Federated States of Micronesia, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Guatemala, Haiti, Honduras, Hungary, India, Indonesia, Iran, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Lao People's Democratic Republic, Latvia, Lebanon, Lesotho, Libya, Liechtenstein, Lithuania, Luxembourg, Malawi, Malaysia, Maldives, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Monaco, Mongolia, Morocco, Mozambique, Myanmar, Namibia, Nepal, Netherlands, New Zealand, Niger, Nigeria, Norway, Oman, Pakistan, Panama, Paraguay, Philippines, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Ruscian Federation, San Marino, Saedi Arabia, Senegal, Seychelles, Singapore, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Sri Lanka, Sudan, Suriname, Sweden, Syria, Thailand, The former Yugoslav Republic of Macedonia, Togo, Trinidad and Tobago, Tunisia, Ukraine, United Arab Emirates, United Kingdom, United Republic of Tanzania, United States, Uruguay, Vanuatu, Vietnam, Yemen, Jambia, Zimbabwe.

*Against*: Turkey.

*Abstain*: Colombia, Ecuador, El Salvador, Iceland, Peru, Venezuela

*Absent* : Afghanistan, Albania, Antigua and Barbuda, Azerbaijan, Bahamas, Belize, Bhutan, Burundi, Cape Verde, Central African Republic, Comoros, Democratic People's Republic of Korea, Djibouti, Dominica, Dominican Republic, Grenada, Guinea, Guinea-Bissau, Guyana, Kyrgyzstan, Madagascar, Mali, Nicaragua, Palau, Papua New Guinea, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Sierra Leone, Somalia, Swaziland, Tajikistan, Turkmenistan, Uganda, Uzbekistan.

## 4. Safety and security of humanitarian personnel and protection of United Nations personnel*

*The General Assembly,*

*Reaffirming* its resolution 46/182 of 19 December 1991 on the strengthening of the coordination of humanitarian emergency assistance of the United Nations,

*Recalling* its resolutions 52/167 of 16 December 1997 on the safety and security of humanitarian personnel and 52/126 of 12 December 1997 on the protection of United Nations personnel and taking note of Commission on Human Rights resolution 1998/37 of 17 April 1998,[1]

*Welcoming* the agreed conclusions of the 1998 humanitarian affairs segment of the Economic and Social Council,[2]

*Concerned* by the increasingly difficult context in which humanitarian assistance takes place in some areas, in particular the continues erosion, in many cases, of respect for the principles and rules of international humanitarian law,

*Welcoming* the upcoming fiftieth anniversary of the Geneva Conventions of 12 August 1949[3] as an opportunity to raise awareness for humanitarian issues, in particular the need to promote and respect and ensure respect for the principles and rules of international humanitarian law,

*Deeply concerned* by the growing number of complex humanitarian emergencies, in particular armed conflicts and post-conflict situations, in the past few years, which have dramatically increased the loss of human lives, suffering of victims and flows of refugees and internally displaced persons, as well as martial destruction, which disrupt the development efforts of countries affected, in particular those of developing countries,

*Taking note* of the statements by the President of the Security Council of 19 June 1997[4] and 29 September 1998,[5] the report of the Secretary-General on protection for humanitarian assistance to refugees and others in conflict situations,[6] and the view expressed during the open debate at the 3932nd meeting of the Security Council on 29 September 1998, on

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* Resolution 53/87 adopted on 7 December 1998, without a vote.

1. See *Official Records of the Economic and Social Council, 1998, Supplement No. 3* (E/1998/23), chap. II, Sect. A.

2. *Official Records of the General Assembly, Fifty-third Session, Supplement No. 3* (A/53/3), chap. VII, agreed conclusions 1998/1.

3. United Nations, *Treaty Series*, vol. 75, Nos. 970-973.

4. S/PRST/1997/34, see Resolutions and Decisions of the Security Council, 1997.

5. S/PRST/1998/30.

6. S/1998/883.

protection for humanitarian assistance to refugees and others in co situations,

*Welcoming* the inclusion of attacks intentionally directed ag personnel involved in a humanitarian assistance or peacekeeping mi in accordance with the Charter of the United Nations as a war crime i Rome Statute of the International Criminal Court, adopted on 17 1998,[1] and noting the role that the court could play in bringing to ju those responsible for serious violations of international humanitarian

*Commending* the courage and commitment of those who take pa humanitarian operations, often at great personal risk,

*Strongly deploring* the rising toll of casualties among humanita personnel and United Nations personnel in complex humanita emergencies, in particular armed conflicts and post-conflict situations, strongly condemning the acts of physical violence and harassment to w those participating in humanitarian operations are too frequently expo

*Aware* that humanitarian operations are generally implemented thro close cooperation among Governments and the United Nations, its agen and other international organizations, and Governments and n governmental organizations,

*Guided* by the relevant provisions on protection contained in Convention on the Privileges and Immunities of the United Nations,[2] Convention on the Privileges and Immunities of the Specialized Agenc and the Convention on the Safety of United Nations and Associa Personnel,[4]

1. *Takes note* of report of the Secretary-General entitled 'Respect the privileges and immunities of officials of the United Nations and specialized agencies and related organizations: safety and security humanitarian personnel and protection of United Nations personnel";

2. *Urges* all States to take the necessary measures to ensure the and effective implementation of the relevant principles and rules international humanitarian law, including those related to the safety security of humanitarian personnel and United Nations personnel;

3. *Also urges* all States to take the necessary measures to ensure safety and security of humanitarian personnel and United Nations personn to respect and ensure respect for the inviolability of United Nations premis

1. A/CONF. 183/9.
2. Resolution 22 A (I).
3. Resolution 179 (II).
4. Resolution 49/59, annex.
5. A/53/501.

vhich are essential to the continuation and successful implementation of Jnited Nations operations, and to ensure the speedy release of United Nations and other personnel carrying out activities in fulfilment of the nandate of a United Nations operation who have been arrested or detained n violation of their immunity, in accordance with the relevant conventions eferred to in the present resolution and applicable international umanitarian law;

4. *Encourages* all States to become parties to and to fully respect the provisions of the relevant international instruments, including the Convention on the Safety of United Nations and Associated Personnel;[1]

5. *Calls upon* all States to provide adequate and prompt information concerning the arrest or detention of humanitarian personnel and United Nations personnel, to allow independent medical teams to investigate the health of those detained, and to afford them the necessary medical assistance;

6. *Requests* the Secretary-General to take the necessary measures to ensure full respect for the human rights, privileges and immunities of United Nations and other personnel carrying out activities in fulfilment of the mandate of a United Nations operation, to consider ways and means to strengthen the protection of United Nations and other personnel carrying out activities in fulfilment of the mandate of United Nations operation, notably by seeking the inclusion, in negotiations of headquarters and other mission agreements concerning United Nations and associated personnel, of the applicable conditions contained in the Convention on the Privileges and Immunities of the United Nations,[2] the Convention on the Privileges and Immunities of the Specialized Agencies,[3] and the Convention on the Safety of United Nations and Associated Personnel;

7. *Also requests* the Secretary-General to take the necessary measures, falling within his responsibilities, to ensure that security matters are an integrated part of the planning for an operation and that such precautions extend to all United Nations and other personnel carrying out activities in fulfilment of the mandate of a United Nations operation;

8. *Further requests* the Secretary-General to take the necessary measures to ensure that United Nations and other personnel carrying out activities in fulfilment of the mandate of a United Nations operation are properly informed and suitably trained so as to enhance their security and effectiveness in accomplishing their functions;

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1. Resolution 49/59, annex.
2. Resolution 22 A (I).
3. Resolution 179 (II).

9. *Calls upon* all States to consider signing and ratifying the R Statute of the International Criminal Court;[1]

10. *Strongly condemns* any act or failure to act which obstruc prevents humanitarian personnel and United Nations personnel discharging their humanitarian functions, or which entails their b subjected to threats, the use of force or physical attack frequently resu in injury or death;

11. *Calls upon* all Governments and parties in complex humanita emergencies, in particular armed conflicts and post-conflict situations countries where humanitarian personnel are operating, in conformity the relevant provisions of international law and national laws, to coope fully with the United Nations and other humanitarian agencies organizations and to ensure the safe and unhindered access of humanita personnel in order to allow them to perform efficiently their task of assist the affected civilian population, including refugees and internally displa persons;

12. *Reaffirms* the necessity for humanitarian personnel and Uni Nations personnel to be properly informed, *inter alia*, by their sponsor organizations of the scope of their activities and the standards that they required to meet, including those contained in relevant domestic a international law, and suitably trained so as to enhance their security a effectiveness in accomplishing their functions;

13. *Reaffirms* the necessity for all humanitarian personnel to resp the national laws of the countries in which they are operating;

14. *Urges* all States to ensure that any threat or act of violence commit against humanitarian personnel on their territory is fully investigated a to take all appropriate measures, in accordance with international law a national legislation, to ensure that the perpetrators of such acts a prosecuted;

15. *Welcomes* the establishment by the Secretary-General of the Tr Fund for Security of personnel of the United Nations system in the field a encourages all States to contribute to the Trust Fund;

16. *Notes* the discussions of the respect for and security of humanitari personnel at the first periodical meeting on international humanitarian la held at Geneva in January 1998, and of the report of the President of t meeting;

17. *Requests* the Secretary-General to present a report to the Gene Assembly at its fifty-fourth session on the safety and security situation humanitarian personnel and protection of United Nations personnel a

1. A/Conf. 183/9.

measures to be taken to improve it, taking into account the views of Governments, the Inter-Agency Standing Committee, other relevant humanitarian actors, and the United Nations Security Coordinator.

## 5. Fiftieth anniversary of the Universal Declaration of Human Rights

*The General Assembly,*

*Recalling* that the Charter of the United Nations reaffirms the faith of the United Nations in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small,

*Recognizing* the Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations as well as the source of inspiration and a basis of subsequent progress in the field of human rights,

*Concerned* that human rights and fundamental freedoms are not fully and universally respected and continue to be violated in all parts of the world, and that people still suffer misery and are deprived of the full enjoyment of their civil, cultural, economic, political and social rights and that some peoples still lack the full enjoyment of their right of self-determination,

*Stressing* the necessity for further national efforts as well as enhanced international cooperation, with a view to fully realizing all human rights and fundamental freedoms, including the need to promote greater awareness of the rights set forth in the Universal Declaration of Human Rights and in other international human rights instruments,

*Reaffirming* that all human rights are universal, indivisible, interdependent and interrelated, and that the international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis,

*Reaffirming* also the need to ensure full implementation of the human rights of women and the girl child as an inalienable, integral and indivisible part of all human rights and fundamental freedoms,

*Reaffirming* further the need for the international community to continue to review and assess the progress made in the field of human rights since the adoption of the Declaration and to identify obstacles and ways in which they can be overcome,

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* Resolution 53/168 adopted on 10 October 1998 without a vote.

*Mindful* that everyone is entitled to a social and international orde which the rights and freedoms set forth in the Universal declaration Human Rights can be fully realized,

*Declares* solemnly its commitment to the fulfilment of the Unive Declaration of Human Rights as a common standard of achievement for peoples and all nations and as a source of inspiration for the furt promotion and protection of all human rights and fundamental freedo — political, economic, social, civil and cultural — including the right development.

## 6. The Millennium Assembly of the United Nations*

*The General Assembly,*

*Recalling* its resolution 52/12 B of 19 December 1997 and decision 5 477 of 6 May 1998,

*Having considered* the report of the Secreatry-General on renewing t United Nations: a programme for reform,[1] and note by the Secretary-Gener on a Millennium Assembly, the United Nations system (Special Commissio and a Millennium Forum,[2]

*Convinced* that the year 2000 constitutes a unique and symbolical compelling moment to articulate and affirm an animating vision for t United Nations in the new era,

*Also convinced* that a Millennium Assembly would provide a opportunity to strengthen the role of the United Nations in meeting t challenges of the twenty-first century,

1. *Decides* to designate the fifty-fifth session of the General Assemb "The millennium Assembly of the United Nations";

2. *Also decides* to convene, as an integral part of the Millenniu Assembly of the United Nations, a Millennium Summit of the United Natio for a limited number of days on dates to be decided by the General Assemb at its resumed fifty-third session;

3. *Requests* the Secretary-General to seek the views of Member State members of the specialized agencies and observers and to propose, aft a process of intergovernmental consultation, a number of forward-lookir and widely relevant topics that could help focus the Millennium Summ

* Resolution 53/202 adopted on 17 December 1998 without a vote.

1. A/51/950.
2. A/52/850.

vithin the context of an overall theme, for consideration by the General Assembly at its resumed fifty-third session;

4. *Also requests* the Secretary-Genral to consult with non-governmental organizations, as appropriate, before the submission of his proposals;

5. *Decides* to continue its consideration of the item entitled "United Nations reform: measures and proposals" and agrees that a decision on the intergovernmental preparatory process, in particular its format and terms of reference, ensuring the full and effective participation of all Member States, members of the specialized agencies and observers in preparing for the Millennium Assembly, should be taken at the earliest opportunity by the General Assembly at its resumed fifty-third session;

6. *Also decides* to include in the provisional agenda of its fifty-fourth session a subitem entitled "The Millennium Assembly of the United Nations" under the item entitled "United Nations reform: measures and proposals".

## 7. Developments in the field of information and telecommunication in the context of international security*

*The General Assembly,*

*Recalling* its resolutions on the role of science and technology in the context of international security, in which, *inter alia*, it recognized that scientific and technological developments could have both civilian and military applications and that progress in science and technology for civilian applications needed to be maintained and encouraged,

*Noting* that considerable progress has been achieved in developing and applying the latest information technologies and means of telecommunication,

*Affirming* that it sees in this process the broadest positive opportunities for the further development of civilization, the expansion of opportunities for cooperation for the common good of all States, the enhancement of mankind's creative potential, and additional improvements in the circulation of information in the global community,

*Recalling* in this connection the approaches and principles outlined at the Information Society and Development Conference, held at Midrand, South Africa, from 13 to 15 May 1996,

Resolution 53/70 adopted on 4 December1998 without a vote.

*Taking note* of the results of the Ministerial Conference on Terr held in Paris on 30 July 1996, and of the recommendations it made

*Noting* that the dissemination and use of information technologie means affect the interests of the entire international community an optimum effectiveness is enhanced by broad international coopera

*Expressing* concern that these technologies and means can poter be used for purposes that are inconsistent with the objectives of mainta international stability and security and may adversely affect the secur States,

*Considering* that it is necessary to prevent the misuse or exploitati information resources or technologies for criminal or terrorist purp

1. *Calls upon* Member States to promote at multilateral level consideration of existing and potential threats in the field of inform security;

2. *Invites* all Member States to inform the Secretary-General of views and assessments on the following questions:

(a) General appreciation of the issues of information security;

(b) Definition of basic notions related to information security, inclu unauthorized interference with or misuse of information telecommunications systems and information resources;

(c) Advisability of developing international principles that w enhance the security of global information and telecommunications sys and help to combat information terrorism and criminality;

3. *Requests* the Secretary-General to submit a report to the Ge Assembly at its fifty-fourth session;

4. *Decides* to include in the provisional agenda of its fifty-fo session an item entitled "Developments in the field of information telecommunications in the context of international security".

## 8. Maintenance of international security — prevention of the violent disintegration of States*

*The General Assembly,*

*Recalling* its resolution 51/55 of 10 December 1996,

*Recalling* the purposes and principles of the Charter of the U Nations,

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* Resolution 53/71 adopted on 4 December1998 with a vote 156-0-6.

1. See A/51/261, annex.

*Convinced* that the observance of the Charter and relevant treaties and her relevant principles and provisions of international law is essential for e strengthening of international peace and security,

*Considering* the emergence of new opportunities for building a peaceful orld,

*Mindful* of the obligations of all States under the Charter, *inter alia*, to frain in their international relations from the threat or use of force against e territorial integrity or political independence of any State and to develop iendly relations among nations, and to promote and encourage respect r human rights and fundamental freedoms for all without distinction as race, sex, language or religion, including rights for persons belonging ethnic, religious or linguistic minorities,

*Deeply* concerned that situations which may threaten international peace nd security persist in spite of the efforts of the United Nations to put an nd to them and to prevent such situations in the future,

*Convinced* of the necessity to enhance the overall conflict prevention nd resolution capability of the United Nations system to prevent the utbreak of conflicts,

*Stressing* the importance of the activities of the international rganizations, such as the Organization of African Unity, the Organization r Security and Cooperation in Europe, the Organization of American tates, the Association of South-East Asian Nations, the Council of Europe, e League of Arab States and the Organization of the Islamic Conference, ith the aim of preventing the violent disintegration of States, of maintaining ternational peace and security and of promoting international cooperation r development,

*Considering* that the violent disintegration of States can pose a threat international peace and security,

*Noting* that the vast majority of violent conflicts as present are conflicts ithin States,

*Affirming* the need for United Nations measures to help prevent the olent disintegration of States, thereby enhancing the maintenance of ternational peace and security and economic and social advancement of l peoples,

1. *Calls upon* States, the relevant international organizations and ompetent organs of the United Nations to continue to take measures in ccordance with the Charter of the United Nations, as appropriate, to iminate threats to international peace and security and to help prevent onflicts which can lead to the violent disintegration of States;

2. *Stresses* the importance of good-neighbourliness and the

development of friendly relations among States to the solution of pr among States, to preventing the violent disintegration of States promoting international cooperation in accordance with the Charte

3. *Calls* upon all States to solve their disputes with other Sta peaceful means in accordance with the Charter;

4. *Affirms* the need for strict compliance with the principle inviolability of international borders;

5. *Also affirms* the need for strict compliance with the principle territorial integrity of any State;

6. *Stresses* the importance of regional efforts aimed at preve bilateral conflicts endangering the maintenance of international peac security;

7. *Requests* all States and the relevant international organizatio communicate to the Secretary-General their views on the maintenan international security prevention of the violent disintegration of Sta

8. *Decides* to include in the provisional agenda of its fifty-fifth se the item entitled "Maintenance of international security prevention o violent disintegration of States".

*In favour*: Afghanistan, Albania, Algeria, Angola, Antigua an Barbuda, Argentina, Australia, Austria, Azerbaijan, Bahama Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Beni Bhutan, Bolivia, Botswana, Brazil, Brunei Darussalam, Bulgari Burkina Faso, Burundi, Cameroon, Canada, Cape Verde, Centra African Republic, Chad, Colombia, Costa Rica, Cote d'Ivoir Croatia, Cyprus, Czech Republic, Democratic Republic of th Congo, Denmark, Djibouti, Dominican Republic, Ecuador, Egyp El Salvador, Equatorial Guinea, Eritrea, Estonia, Ethiopia, Federate States of Micronesia, Fiji, Finland, France, Gambia, Georgi Germany, Ghana, Greece, Guatemala, Guinea, Guinea-Bissau Guyana, Haiti, Hungary, Iceland, India, Indonesia, Iran, Ireland Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kuwai Kyrgyzstan, Latvia, Lebanon, Lesotho, Libya, Lithuani Luxembourg, Madagascar, Malawi, Malaysia, Maldives, Mali Malta, Marshall Islands, Mauritania, Mauritius, Monaco, Mongoli Morocco, Myanmar, Namibia, Nepal, Netherlands, New Zealand Niger, Nigeria, Norway, Oman, Panama, Papua New Guine Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic o Korea, Republic of Moldova, Romania, Russian Federation, Sai Lucia, Saint Vincent and the Grenadines, Samoa, San Marino, Sau Arabia, Sengal, Seychelles, Sierra Leone, Singapore, Slovaki

Slovenia, Solomon Islands, South Africa, Spain, Sri Lanka, Sudan, Suriname, Swaziland, Sweden, Tajikistan, Thailand, The former Yugoslav Republic of Macedonia, Togo, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Arab Emirates, United Kingdom, United Republic of Tanzania, United States, Uruguay, Uzbekistan, Vanuatu, Venezuela, Yemen, Zambia, Zimbabwe.

*Against*: None,

*Abstain*: Armenia, Chile, China, Liechtenstein, Mexico, Pakistan.

*Absent*: Comoros, Cuba, Democratic People's Republic of Korea, Dominica, Gabon, Grenada, Honduras, Lao People's Democratic Republic, Mozambique, Nicaragua, Palau, Rwanda, Saint Kitts and Nevis, Syria, Vietnam.

## 9. Role of the United Nations in promoting development in the context of globalization and interdependence*

*ie General Assembly,*

*Reaffirming* the principles and purposes of the Charter of the United ations, particularly with regard to the role of the United Nations in omoting international economic and social cooperation, including eking solutions to international economic, social and related problems,

*Recognizing* the challenges and opportunities of globalization and terdependence,

*Expressing concern* over the serious risks of marginalization of a large mber of developing countries from the globalization process, including the finance and trade sectors, and the increasing vulnerability of those veloping countries which are integrating into the world economy, resulting rticularly from the volatility of short-term capital flows and the centuation of income disparities within and among countries,

*Mindful*, in the process of trade liberalization, of the diminution of trade eferential margins for developing countries, particularly the least veloped countries and small island developing States, and of the need r countries to take measures, as appropriate, in accordance with the rules the World Trade Organization, to address that diminution with a view to fsetting it,

*Recognizing* that globalization and interdependence have opened new portunities, through increased trade and capital flows and advancement

Resolution 53/169 adopted on 15 December1998 without a vote.

in technology, for the growth of the world economy, for developme for the improvement of living standards around the world,

*Underlining* the need to work on a wide range of reforms to cr strengthened international financial system,

*Stressing* the importance of promoting the integration of devel countries into the world economy to allow them to take the fullest po advantage of the trading opportunities arising from globalizatio liberalization,

*Emphasizing* that technical assistance is also vital in enabling devel countries to benefit from the international trading environment,

*Underlining* the urgent need to mitigate the negative consequenc globalization and interdependence so as to realize the mutually reinfo objectives of property eradication and development, Reiterating tha United Nations is in a unique position, as a universal forum, to ach international cooperation in addressing the challenges of promo development in the context of globalization and interdependence,

*Emphasizing* that the United Nations system has a key role in fost greater coherence, complementarity and coordination in economic development issues at the global level,

*Recognizing* the importance of appropriate policy responses at national level by all countries to the challenges of globalization, in partic by pursuing sound macroeconomic and social policies, noting the nee support from the international community for the efforts, in particula the least developed countries, to improve their institutional and manage capacities, and also recognizing that all countries should pursue pol conducive to economic growth and to promoting a favourable gl economic environment,

*Recalling* the outcome of the ninth session of the United Nat Conference on Trade and Development, held at Midrand, South Af from 27 April to 11 May 1996,[1] which provides a important framewor promoting partnership for growth and development in the contex globalization and interdependence,

*Noting* the special high-level dialogue between the Economic and So Council and the Bretton Woods institutions, held on 18 April 1998, and ministerial communique on market access adopted by the Economic Social Council at the high-level segment of its 1998 substantive sessi

1. Proceedings of the United Nations Conference on Trade and Development, N Session, Midrand, Republic of South Africa, 27 April-11 May 1996, Repor Annexes (United Nations publications, Sales No. E.97.II.D.4), Part One, sec
2. Official Records of the General Assembly, Fifty-third Session, Supplement N (A/53/3), chap. IV, para.5.

*Recalling* the widely shared desire expressed during the high-level alogue of the General Assembly, held on 17 and 18 September 1998, hich constituted a renewal of the dialogue on strengthening international onomic cooperation for development through partnership, to continue scussions with a view to developing a coherent and effective response to e opportunities and challenges being offered by globalization and terdependence,

*Taking note* of the report of the Secretary-General on the causes of nflict and the promotion of durable peace and sustainable development Africa,[1] wherein he identified, *inter alia*, the obstacles to the full rticipation of the African economies in the globalization process,

1. *Reaffirms* that the United Nations has a central role to play in omoting international cooperation for development and in providing uidance on global development issues, including in the context of obalization and interdependence;

2. *Re-emphasizes* the importance of recognizing the needs of developing ountries, particularly the special needs of lest developed countries and the nall island developing States, in the context of globalization, and urges e international community, including the World Trade Organization, to ontinue to grant more preferential treatment of developing countries, cluding the least developed countries and the small island developing tates;

3. *Welcomes* the efforts of the United Nations Conference on Trade and evelopment and the International Trade Centre to help developing ountries, in particular the least developed countries and the small island eveloping States, address their specific concerns within the globalizing conomy, in particular through technology-related assistance in the fields f trade, policy, improvement of trade efficiency and policies and trade in ervices, in particular in electronic commerce;

4. *Emphasizes* the importance of recognizing and addressing the specific oncerns of economies in transition so as to help them to benefit from obalization with a view to their full integration into the world economy;

5. *Underlines* the need to continue to work to ensure the full participation f all the developing countries in the benefits of globalization and also the eed to reduce their vulnerability to the negative impacts of globalization nd interdependence;

6. *Emphasizes* that concerted efforts should be made, through enhanced ooperation and coordination among all the relevant forums and stitutions, to minimize the negative impacts and maximize the benefits of

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[1] A/52/871-S/1998/318.

globalization and interdependence for the developing countries;

7. *Stresses* the importance, at the national level, of maintaining s macreconomic policies and developing effective institutional regulatory frameworks and human resources;

8. *Strongly underlines* the importance of an enabling environmen investment, in particular foreign direct investment, market access, governance, increase in the volume and effectiveness of off development assistance, tackling of unsustainable debt burdens, inclu through debt conversion measures, flexibility in the heavily indebted countries initiative and support for regional cooperation and integratio priority areas that need to be addressed in order to achieve sustain development in all African countries and to encourage the participatio all African countries in the global economy, as recommended in the re of the Secretary-General;[1]

9. *Stresses* the need for continued and constructive dialogue in appropriate forums among developed and developing countries on iss related to strengthening and reforming the international finan architecture;

10. *Recognizes* the urgency of working together in developing a glo approach to mitigate the negative consequences of globalization interdependence, taking into account the specific vulnerabilities, conce and need of developing countries;

11. *Invites* the Economic and Social Council and the Bretton Wo institutions, in their high-level dialogue in the spring of 1999, also address ways and means on how to optimize the benefits and minimize negative consequences of globalization and interdependence, in partic for the developing countries;

12. *Requests* the Secretary-General to prepare, in collaboration w the United Nations Conference on Trade and Development and consultation with relevant organizations, in particular the World Tr Organization, the International Monetary Fund, the World Bank and regional commissions, an analytical report, to be submitted to the Gene Assembly at its fifty-fourth session, that examines the interrelated issues order to facilitate better understanding of globalization and ma recommendations on, inter alia:

(a) The role of the United Nations in promoting development in context of globalization and interdependence;

(b) Promoting coherence, complementarity and coordination economic and development issues at the global level in order to optim

1. A/52/871-S/1998/318.

e benefits and limit the negative consequences of globalization and terdependence;

13. *Decides* to include in the agenda of its fifty-fourth session an item titled "Globalization and interdependence".

**10. Action against corruption and bribery in international commercial transactions***

*ne General Assembly,*

Recalling its resolution 3514 (XXX) of 15 December 1975, in which , *inter alia*, condemned all corrupt practices, including bribery, in ternational commercial transactions, reaffirmed the right of any State to lopt legislation and to investigate and take appropriate legal action, in ccordance with its national laws and regulations, against such corrupt actices, and called upon all Governments to cooperate to prevent corrupt actices, including bribery,

*Concerned* about the seriousness of problems posed by corruption, hich may endanger the stability and security of societies, undermine the alues of democracy and morality and jeopardize social, economic and olitical development,

*Disturbed* by the bribery of public officials by individuals and nterprises of other States in relation to international commercial ansactions,

*Recalling* the further work carried out by the General Assembly and the conomic and social Council on elaborating the International Code of onduct for Public Officials[1] and a code of conduct for transnational orporations,[2] consideration of which helped call attention to and raise ternational awareness of the adverse consequences of corruption and ibery in international commercial transactions,

*Noting* the Rules of Conduct to Combat Extortion and Bribery in ternational Business Transactions of the International Chamber of ommerce,

*Recalling* its resolution 51/191 of 16 December 1996, by which it lopted the United Nations Declaration against Corruption and Bribery in ternational Commercial Transactions, and its resolution 52/87 of 12 ecember 1997, by which it called for further measures to implement the eclaration,

Resolution 53/176 adopted on 15 December1998 without a vote.

Resolutions 51/59, annex.

E/1991/31/Add.1.

1. *Welcomes* recent multilateral initiatives to combat corru including, *inter alia*, the Inter-American Convention against Corrup the Organisation for Economic Cooperation and Development Conve on Combating Bribery of Foreign Public Officials in International Bus Transactions, the Dakar Declaration on the Prevention and Contr Organized Transnational Crime and Corruption, the Manila Declaratio the Prevention and Control of Organized Transnational Crime Corruption, the convention on the fight against corruption involvin officials of the European Communities or officials of member States o European Union;

2. *Takes note* of the report of the Secretary-General entitled "Promo and maintenance of the rule of law: action against corruption and bribe

3. *Commends* the work of the Commission on Crime Prevention Criminal Justice and the Centre for International Crime Preventio combating corruption and bribery in international commercial transacti including the convening of an open-ended meeting of governme experts;

4. *Calls upon* Member States to take all possible measures to further implementation of the United Nations Declaration against Corruption Bribery in International Commercial Transactions[3] and relevant internati declarations and to ratify, where appropriate, existing instruments aga corruption;

5. *Requests* the United Nations Conference on Trade and Developm and other competent bodies of the United Nations system, within t respective mandates and agreed work programmes, to assist Member Sta at their request, in implementing national programmes to strengt accountability and transparency and in implementing relevant conventi declarations and instruments to combat corruption and bribery international commercial transactions and, in that context, welcomes valuable work done by the United Nations Development Programme in filed of governance;

6. *Also requests* the Secretary-General, in close consultation with United Nations Conference on Trade and Development, to report to General Assembly at its fifty-fifth session on measures taken by Mem States and competent international and regional organizations, n governmental organizations and the private sector to implement the pre resolution.

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1. See E/1996/99.
2. A/53/384.
3. Resolution 51/191, annex.

## 11. Convention on Biological Diversity*

*he General Assembly,*

*Recalling* its resolution 52/201 of 18 December 1997 on the Convention n Biological Diversity and other relevant resolutions relating to the onvention,

*Recalling also* the provisions of the Convention on Biological iversity,[1]

*Recalling further* Agenda 21,[2] particularly its chapter 15 on the onservation of biological diversity and related chapters,

*Having considered* the report of the Executive Secretary of the onvention on Biological Diversity,[3]

*Deeply concerned* about the continued loss of the world's biological iversity and, on the basis of the provisions of the Convention, reaffirming he commitment to the conservation of biological diversity, the sustainable se of its components, and the fair and equitable sharing of benefits arising ut of the utilization of genetic resources, including by appropriate access genetic resources and by appropriate transfer of relevant technologies, aking into account all rights over those resources and to technologies, and y appropriate funding,

*Recognizing* the contribution of indigenous and local communities to he conservation and sustainable use of biological resources,

*Emphasizing* that the Convention is an important instrument for chieving sustainable development, taking into account its three objectives, nd for promoting the ecosystem approach embodied in the Convention nd the decisions of the Conference of the Parties to the Convention,

*Recalling* the decisions adopted by the Conference of the Parties at its ourth meeting, relating to intellectual property rights and the relationship f the Convention with other international agreements,

*Noting* the dialogue taking place in the Committee on Trade and nvironment of the World Trade organization on the provisions of the greement on Trade-related Aspects of Intellectual Property Rights,

*Encouraged* by the work carried out to date under the Convention, and atisfied that most States and one regional economic integration

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Resolution 53/190 adopted on 15 December1998 without a vote.

See United Nations Environment Programme, *Convention on Biological Diversity* (Environment Law and Institution Programme Activity Centre), June 1992.

Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992 (United Nations publication, Sales No. E. 93.I.8 and corrigenda), vol I: Resolutions adopted by the Conference.

A/53/451, annex.

organization have ratified the Convention,

*Taking note with appreciation* of the generous offer of the Governm of Colombia to host the sixth meeting of the Open-ended *Ad hoc* Work Group on Biosafety and the extraordinary meeting of the Conference of Parties, which will take place at Cartagena de Indias from 15 to 19 Febru and on 22 and 23 February 1999, respectively,

*Recalling* its invitation to the Executive Secretary of the Convention Biological Diversity to report to the General Assembly on the result future meeting of the Conference of the Parties to the Convention,

*Noting* the importance of decision IV/6, in particular paragraph thereof, adopted by the Conference of the Parties at its fourth meeting

1. *Welcomes* the results of the fourth meeting of the Conference of t Parties to the Convention on Biological Diversity, held at Bratislava fro 4 to 16 May 1998;[1]

2. *Welcomes* the decision of the fourth meeting of the Conference of t Parties on the adoption of the programmes of work and the thematic approa adopted to guide its work in the development of the Convention for t foreseeable future, including its in-depth consideration of ecosystems;

3. *Calls upon* Governments, in cooperation with the Conference of th Parties, to use science-based analysis, to study and monitor closely th evolution of new technologies to prevent possible adverse effects on th conservation and sustainable use of biological diversity, which might hav an impact on farmers and local communities;

4. *Recognizes* the importance of the adoption of a protocol on bi safety at the extraordinary meeting of the Conference of the Parties 1999, or as soon as possible thereafter;

5. *Welcomes* decision IV/15, adopted by the Conference of the Partie at its fourth meeting, in which the Conference of the Parties stresses th need to ensure consistency in implementing the Convention and Worl Trade Organization agreements, including the Agreement on Trade-relate Aspects of Intellectual Property Rights, with a view to promoting increase mutual supportiveness and integration of biological diversity concern and the protection of intellectual property rights;

6. *Reaffirms* paragraph 10 of decision IV/15, in which the Conferenc of the Parties emphasizes that further work is required to help develop common appreciation of the relationship between intellectual propert rights and the relevant provisions of the Agreement on Trade-related Aspec of Intellectual Property Rights and the Convention on Biological Diversit

1. See A/53/451, annex.
2. Decision IV/16.

in particular on issues relating to technology transfer and conservation and sustainable use of biological diversity and the fair and equitable sharing of benefits arising out of the use of genetic resources, including the protection of knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity;

7. *Recognizes* the importance of the implementation of the Convention at all levels, including through the preparation and implementation of national strategies, plans and programmes, taking into account the need for financial resources to support the implementation activities, in particular those developing countries, in accordance with the provisions of the Convention and decisions of the Conference of the Parties;

8. *Encourages* those States that have not yet ratified the Convention to do so as soon as possible;

9. *Welcomes* decision IV/8, adopted by the Conference of the Parties at is fourth meeting, in which the Conference of the Parties decided to establish a panel of experts to implement the terms outlined in the decision;

10. *Recognizes* the importance of national action to conserve biological diversity in many habitats, including forests, wetlands and coastal areas, in accordance with the relevant provisions of the Convention, in particular article 8, and the need to mobilize national and international support for such national actions;

11. *Welcomes* the decision of the Conference of the Parties at its fourth meeting to include an item entitled "Alien species that threaten ecosystems, habitat or species" in the agenda of its sixth meeting;

12. *Recognizes* the utility of information exchange, and encourages the development of biodiversity information networks at the national, regional and international levels;

13. *Invites* all funding institutions and bilateral and multilateral donors, as well as regional funding institutions and non-governmental organizations, to cooperate with the secretariat of the Convention in the implementation of the programme of work;

14. *Calls upon* States parties to the Convention to urgently settle any arrears and pay their contribution in full and in a timely manner so as to ensure continuity in the cash flows required to finance the ongoing work of the Conference of the Parties, the subsidiary bodies[1] and the Convention secretariat;

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1 See United Nations Environment Programme, *Convention on Biological Diversity* (Environmental law and Institution Programme Activity Centre), June 1992, Articles 23.4 (g) and 25

15. *Invites* the Executive Secretary of the Convention on Biolo Diversity to report to the General Assembly on the ongoing work o Convention;

16. *Decides* to include in the provisional agenda of its fifty-fo session the sub-item entitled "Convention on Biological Diversity".

## 12. Triennial policy review of operational activities for development of the United Nations system*

*The General Assembly,*

Recalling its resolutions 44/211 of 22 December 1989, 47/199 of December 1992, 50/120 of 20 December 1995, 52/203 of 18 Decem 1997, and 52/12 B of 19 December 1997, and taking into account the vi of Member States, as well as Economic and Social Council resoluti 1996/42 of 26 July 1996 and 1998/26 of 28 July 1998,

*Reaffirming* that operational activities for development within the Uni Nations system have an important role to play in enabling develop countries to continue to take a lead role in the management of their o development process,

*Stressing* that national plans and priorities constitute the only via frame of reference for the national programming of operational activit for development within the United Nations system, and that programn should be based on such development plans and priorities and sho therefore be country-driven,

*Also stressing*, in that context, the need to take into account the outcon and commitments of relevant United Nations conferences, as well as individual mandates and complementarities of the organizations and bod of the United Nations development system, bearing in mind the need avoid duplication,

*Further stressing* that the fundamental characteristics of the operatio activities of the United Nations system should be, *inter alia*, their univers voluntary and grant nature, their neutrality and their multilateralism, well as their ability to respond to the development needs of developi countries in a flexible manner, and that the operational activities of United Nations system are carried out for the benefit of recipient countri at the request of those countries and in accordance with their own polic and priorities for development,

* Resolution 53/192 adopted on 15 December1998 without a vote.

*Noting*, in this context, the activities of United Nations funds and programmes aimed at providing technical assistance to recipient countries, in response to their national economic and social needs and priorities, including poverty eradication, promotion of all human rights, including the right to development, for achieving sustained economic growth and sustainable development in accordance with relevant General Assembly resolutions and recent United Nations conferences, and stressing the need for these activities to be undertaken at the request of interested recipient Governments strictly within the respective mandates of United Nations funds and programmes, which should receive increased contributions from donor countries,

*Recognizing* the urgent and specific needs of the low-income countries, in particular the least developed countries,

*Emphasizing* that developing countries are responsible for their development processes, and in this context stressing the responsibility of the international community, in partnership, to assist developing countries in their national development efforts,

*Recalling also* the role of the Economic and Social Council in providing coordination and guidance to the United Nations system to ensure that policies formulated by the General Assembly, particularly during the triennial policy review of operational activities, are implemented on a system-wide basis in accordance with Assembly resolutions 48/162 of 20 December 1993 and 50/227 of 24 May 1996,

1. *Takes note with appreciation* of the report of the Secretary-General on the triennial comprehensive policy review of operational activities for development of the United Nations system;[1]

2. *Reaffirms* its resolutions 47/199, 50/120, and parts relevant to operational activities for development of its resolution 52/12 B, and stresses the need to implement fully, based on lessons learned, all the elements of these resolutions in a coherent and timely manner, keeping in mind their interlinkages;

3. *Emphasizes also* that recipient Governments have the primary responsibility for coordinating, on the basis of national strategies and priorities, all types of external assistance, including that provided by multilateral organizations, in order to integrate effectively such assistance into their development process;

4. *Notes* the efforts made in order to rationalize and improve the function and impact of the United Nations fund and programmes;

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[1] A/53/226 and Add.1-4.

I.A

*Reform of United Nations operational activates*

5. *Stresses* the need for all organizations of the United Na development system to focus their efforts at the field level on priority a in accordance with the priorities identified by recipient countries an mandates, mission statements and relevant decisions of their gove bodies, in order to avoid duplication and enhance the complementarity impact of their work;

6. *Further stresses* that, in the context of the reform of the U Nations Secretariat and the restructuring and revitalization of intergovernmental process, the mandates of the separate sectorial specialized entities, funds, programmes and specialized agencies sh be respected and enhanced, taking into account their complementari

I.B.

*Funding for United Nations operational activities*

7. *Notes with regret* that although significant progress has already b achieved on the governance and functioning of the United Nati development funds and programmes, there has not been, as part of overall change process, any increase in core resources for operatio activities for development on a predictable, continuous and assured ba

8. *Expresses serious concern* at the persistent insufficiency of resou for the operational development activities of the United Nations particular the decline in contributions to core resources;

9. *Reaffirms* the need for priority allocation of scarce grant resou to programmes and projects in low-incomes countries, particularly least developed countries;

10. *Strongly reaffirms* that the impact of the operational activities of Untied Nations system must be enhanced by, *inter alia*, a substan increase in their funding on a predictable, continuous and assured ba commensurate with the increasing needs of developing countries, as as through the full implementation of its resolutions 47/199, 48/162, 120 and parts relevant to operational activities for development of resolution 52/12 B;

11. *Stresses* the need for a continuous overall improvement in effectiveness, efficiency and impact of the United Nations system delivering its development assistance, and welcomes steps that have b taken towards that end;

12. *Notes with appreciation* the sustained contributions of many donors d recipient countries to operational activities for development in a spirit partnership;

13. *Urges* developed countries, in particular those countries whose erall performance is not commensurate with their capacity, taking into count established official development assistance targets, including rgets established at the Second United Nations Conference on the Least eveloped Countries and their current levels of contribution, to increase bstantially their official development assistance, including contributions the operational activities of the United Nations system;

14. *Stresses* that other countries that are in a position to do so should rive to augment their assistance in the framework of development ooperation;

15. *Notes* the importance of non-core resources, including cost-sharing, ust funds and non-traditional sources of financing, as a mechanism to hance the capacity and to supplement the means of operational activities r development;

16. *Notes* the discussions on funding strategies in the executive boards the United Nations funds and programmes, including, *inter alia*, the ecisions adopted recently by the Executive Board of the United Nations evelopment Programme and the United Nations Population Fund as part ongoing efforts by Member States to reverse the declining trend in core sources and to put funding of United Nations development activities on predictable, continuous and assured basis, commensurate with the needs the developing countries, and in this context urges the expeditious and oductive outcome of these and other executive board discussions, and vites the Economic and Social Council to consider, on an annual basis, e overall financial picture of the funds and programmes;

I.C.

*United Nations Development Assistance Framework*

17. *Emphasizes* that the United Nations Development Assistance amework, which is currently in a pilot phase, should promote a country-iven, collaborative and coherent response by the United Nations system achieve greater impact at the country level, fully consistent with and in pport of national priorities as expressed in the country strategy notes or levant national development plans, as appropriate;

18. *Stresses* the importance of ensuring full government participation the formulation of the United Nations Development Assistance

Framework and its full ownership through the agreement of the re Governments concerned to the finalized Framework, bearing in mi the responsibility for coordination of all assistance and develo activities rests with the national Government;

19. *Stresses* also the need to ensure the full and active participat the funds and programmes and specialized agencies of the United N system in the preparation of the United Nations Development Assi Framework;

20. *Notes* the importance of closer consultation in the formulati the United Nations Development Assistance Framework between na Governments, relevant United Nations development agencies incl specialized agencies, and other relevant development partners;

21. *Notes* that the country strategy note remains a voluntary init and that where it does not exist, other similar frameworks reflecting na priorities should be used as the basis for the preparatory of the U Nations Development Assistance Framework, to ensure that the Frame fully responds to national development priorities and needs;

22. *Notes* the role that the United Nations Development Assist Framework should play to facilitate, *inter alia*, the United Nat contribution to the coordinated follow-up of the major United Na conferences at the field level, and the importance of the common co assessment for the effective formulation of the United Nations Develop Assistance Framework;

I.D

*Resident coordinator system*

23. *Requests* the Secretary-General to continue to make the res coordinator system more participatory in its functioning at the field by, *inter alia*, making greater use of thematic groups and adopting a consultative approach within the United Nations system;

24. *Notes* the improvements in the functioning of the resi coordinator system, and encourages further progress, in close consult with national Governments;

25. *Encourages* further efforts, including through the United Na Development Group, to further improve the resident coordinator sys and welcomes the efforts to continue to broaden the base of recruitme resident coordinators, increasing the number of women resi coordinators, and improving its selection criteria and procedures, inclu through the use of competency assessment and training and by ens

the resident coordinators take fully into account the mandates of all anizations of the resident coordinator system;

26. *Reaffirms* that resident coordinators, in full consultation with national ernments, should facilitate a coherent and coordinated United Nations ow-up to major international conferences as the field level;

27. *Requests* the United Nations system, including the funds and grammes, specialized agencies and the Secretariat, to provide support he resident coordinator system;

I.E

*United Nations Development Group*

28. *Urges* the United Nations Development Group to work in a fully nsparent and accountable manner towards a more coherent United ions performance in the development field, while respecting the specific ndates and identity of its members;

II.A

*Planning, Programming and Implementation*

29. *Stresses* that the needs and priorities of recipient countries require ibility and decentralization of operational activities to the country level, the continued application of these measures to further enhance gramme responsiveness and impact;

30. *Decides* that with the agreement of the host country, the United ions development system should assist national Governments in creating enabling environment in which the links between national Governments, United Nations development system, civil society, national non-ernmental organizations and the private sector that are involved in the elopment process are strengthened with a view to seeking new and ovative solutions to development problems in accordance with national cies and priorities;

31. *Calls* for the further simplification, harmonization and onalization of procedures for operational activities of the United Nations elopment system at the field level, where possible, and developing nmon databases, in consultation with national Governments;

32. *Urges* the funds and programmes to put in place specific measures timetables to advance the simplification and harmonization of cedures, and to report on these to their respective governing bodies;

33. *Also calls* for the United Nations development system to pr greater consistency in the presentation of budgets at the headquarters and, at the field level, the sharing of administrative systems and se

34. *Emphasizes* the need to implement the outcome of the major Nations conferences through fulfilling the commitments and targets at those conferences, and in this context stresses the importance to acc efforts for the coordinated follow-up of major United Nations confer and in this context welcomes Economic and Social Council decision 290 of 31 July 1998, in which the Council decided on a step-by-step an intergovernmental process on relevant indicators to monit implementation of conference outcomes at all levels, and in this c also welcomes the decision to hold an informal Council meeting o issue in 1999;

35. *Encourages* greater cooperation between the World Bank, re development banks and all funds and programmes with a view to inc complementarity and better division of labour, as well as enha coherence in their sectoral activities, building on the existing arrange and fully in accordance with the priorities of the recipient Governn

36. *Notes* the current initiatives in pursuing common premises an need to take fully into account cost-benefit studies as called for by rel resolutions, and encourages further implementation of such initia where appropriate, while ensuring that there will be no additional b imposed on host countries;

II.B

*Capacity-building*

37. *Reaffirms* that capacity-building and its sustainability shou explicitly articulated as a goal of technical assistance provided b operational activities of the United Nations system at the country with the aim of strengthening national capacities in the fields of, *inter* policy and programme formulation, development management, plan implementation, coordination monitoring and review;

II. C

*Humanitarian assistance*

38. *Expresses* concern at the growing number of natural disaster environmental emergencies which often strike countries that lac resources to cope with them adequately;

39. *Recognizes* that the phases of relief, rehabilitation, reconstruction d development are generally not consecutive but often overlap and cur simulatanecously, and notes the urgent need to develop, through a ategic framework, when appropriate, a comprehensive approach to untries in crisis, and that the development of such a comprehensive proach must involve national authorities, as well as the United Nations stem, donors and intergovernmental and non-governmental ganizations, and that national authorities must take a leading role in all pects of the recovery plan and also notes in this context the need for an rly application of developmental tools in humanitarian emergencies, and kes note with appreciation of the recommendations included in the report the Secreatry-General in this regard;

40. *Stresses* that contributions to humanitarian assistance should not provided at the expense of development assistance, and that sufficient sources for humaitarian assistance should be made available by the ternational community;

II.D

*Regional dimension*

41. *Stresses* the growing need for incorporating the regional and bregional dimension in United Nations operational activities for evelopment, and encourages the resident coordinators, in close nsultation with Governments, to secure greater involvement of the gional commissions, taking into account their agreed mandates and work ogrammes, in the United Nations Development Assistance Framework, appropriate;

II.E

*Cross-cutting themes*

II.E.I

*South-South cooperation/technical and economic cooperation among veloping countries*

42. *Requests* the United Nations system to take appropriate measures improve the effective incorporation of technical cooperation among veloping countries into their programmes and projects, and to intensify forts towards mainstreaming the modality of technical cooperation among veloping countries, including through support to the activities of the ecial Unit for Technical Cooperation among Developing Countries, and courages other relevant international institutions to undertake similar easures;

43. *Stresses* that South-South cooperation, including technica economic cooperation among developing countries, offers v opportunities for the development of developing countries, and i context requests the executive boards of the funds and programm review, with a view to considering an increase, the allocation of reso for technical cooperation among developing countries activities;

44. *Notes* with satisfaction the broad-based support for tech cooperation among developing countries expressed by Member Sta the twentieth anniversary commemoration of the Buenos Aires Pl Action for Promoting and Implementing Technical Cooperation ar Developing Countries;[1]

45. *Takes note with appreciation* of the recommendation strengthening the integration of economic and technical cooperation ar developing countries contained in the report of the Secretary-Gener

II.E.2

*Gender*

46. *Requests* the Secretary-General and the United Nations developn system to take all measures to ensure gender balance when m appointments, including at the senior level and in the field, in accorda with relevant General Assembly resolutions;

47. *Stresses* the need for gender mainstreaming in operational activi of the United Nations system in all fields, in particular in support of pov eradication;

II.E.3

*National execution*

48. *Further* decides that the United Nations system should use to fullest extent possible and practicable available national expertise indigenous technologies in the implementation of operational activiti

49. *Calls upon* all funds and programmes to consider ways to increa within existing rules and regulations, the procurement of goods and servi from development countries, both as a mechanism to promote South-Sc cooperation and for enhancing national execution;

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1. *Report of the United Nations Conference on Technical Cooperation am Developing Countries, Buenos Aires, 30 August-12 September 1978* (United Nat publication, Sales No. E. 78.II.A.11 and corrigendum), chap.I.

50. *Calls* for further work on the development of common guidelines the field level for the recruitment, training and remuneration of national oject personnel, including national consultants, in the formulation and nplementation of development projects and programmes supported by e United Nations development system in order to enhance the coherence the system;

51. *Requests* the organizations and bodies of the United Nations system continue to work on promoting, improving and expanding national ecution, including through the simplification and strengthening of levant procedures, so as to contribute to the advancement of national wnership and to enhance the absorptive capacity in developing countries, particular in the least developed countries in Africa;

III

*Monitoring and evaluation*

52. *Recognizes* that the monitoring and evaluation process of operational tivities, including joint evaluations, should be impartial and independent, nder the overall leadership of the Government;

53. *Notes* the report on pilot evaluation conducted on the impact of perational activities and the need to continue these evaluations with the ill and effective involvement of the recipient Government concerned in e process of such evaluation;

54. *Emphasizes* the importance of disseminating the experience of fective and efficient cooperation within the United Nations development stem;

55. *Underlines* the importance of promoting, under the leadership of overnments, greater collaboration on issues relating to evaluation among cipient Governments, the United Nations development system, in articular the members of the United Nations Development Group, and levant development partners at the country level;

56. *Recognizes*, in that context, the need to strengthen capacities of the cipient countries to perform both effective programme, project and nancial monitoring and impact evaluations of operational activities funded the United Nations;

57. *Further requests* that the United Nations system strengthen its forts, in consultation with recipient countries, to ensure that the lessons arned from both monitoring and evaluation exercises are systematically plied into programming processes at the operational level and that aluation criteria are built into all projects and programmes at their design

stage;

IV

*Follow-up*

58. *Reaffirms* that the governing bodies of the funds, programmes specialized agencies of the United Nations system should take approp action for the full implementation of the present resolution, and req the executive heads of those funds, programmes and specialized ager to submit a yearly progress report to their governing bodies on meas taken and envisaged for the implementation of the present resolution well as appropriate recommendations;

59. *Invites* the executive boards of the United Nations funds programmes to ensure that the heads of these funds and programmes inc in their annual reports to the Economic and Social Council, prepared accordance with Council resolution 1994/33 of 28 July 1994, a thoro analysis of problems encountered and lessons learned, with emphasis issues arising from the implementation of the Secretary-General's refo programme, the triennial policy review and the follow-up to internatio conferences, so as to allow the Council to fulfil its coordinating role;

60. *Requests* the Secretary-General, after consultation with the fur programmes and specialized agencies of the United Nations system, present a progress report to the Economic and Social Council, at substantive session of 1999, on an appropriate management proce containing clear guidelines, targets, benchmarks and time-frames for full implementation of the present resolution;

61. *Invites* the Economic and Social Council, during the operatio activities segment of its substantive sessions of 1999 and 2000, to exam the operational activities of the United Nations system in order to evalu the implementation of the present resolution with a view to ensuring its f implementation;

62. *Further invites* the Economic and Social Council, at its substant session of 1999, to consider, *inter alia*, the issues of poverty eradicat and capacity-building, and at its substantive session of 2000, to consic *inter alia*, harmonization and simplification, including of programmi and resources, on the basis of progress reports by the Secretary-Gene including appropriate recommendations;

63. *Decides*, as an integral part of the next triennial policy review operational activities, in consultation with Member States, to conduct evaluation of the impact of the United Nations Development Assista Framework in the field of operational activities, and requests the Secreta

eneral to report, through the Economic and Social Council at its substantive ssion of 2001, on the results of such an evaluation, including lessons arned and recommendations made, for consideration by the General ssembly at its fifty-sixth session, and also requests the Secretary-General report annually to the Economic and Social Council on the United Nations evelopment Assistance Framework;

64. *Requests* the Secsretary-General to submit to the General Assembly its fifty-sixth session, through the Economic and Social Council, a omprehensive analysis of the implementation of the present resolution in e context of the triennial policy review, and to make appropriate ecommendations.

## 13. Agreement on cooperation and relationship between the United Nations and the International Tribunal for the Law of the Sea

*he General Assembly,*

*Recalling* its resolution 51/34 of 9 December 1996 in which, *inter alia*, t invited the Secretary-General to take steps to conclude a relationship greement with the International Tribunal for the Law of the Sea,

*Noting* the decision of the International Tribunal for the Law of the Sea aken at its fifth session on 12 March 1998 to approve the Agreement on Cooperation and Relationship between the United Nations and the nternational Tribunal for the Law of the Sea signed on 18 December 1997 y the Secretary-General of the United Nations and the President of the nternational Tribunal for the Law of the Sea,

*Noting also* that the eighth meeting of States Parties held in New York rom 18 to 22 May 1998 took note with appreciation of the report of the nternational Tribunal for the Law of the Sea, including paragraphs 67 and 8, relating to the conclusion of the Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for he Law of the Sea[1],

*Having considered* the Agreement on Cooperation and Relationship etween the United Nations and the International Tribunal for the Law of he Sea,[2]

*Approves* the Agreement, which is annexed to the present resolution.**

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Resolution 52/251 adopted on 8 September 1998 without a vote.

* For Annex, see Official Documents section of the *IJIL*, vol. 38 (1998), pp 531-37

SPIOS/31, paras. 13, 14, and SPLOS/27.

A/52/968. annex.

## 14. Mutual assistance and international cooperation in criminal matters*

*The General Assembly*

*Bearing in mind* that the United Nations model treaties on internat cooperation in criminal matters provide important tools for the develop of international cooperation,

*Convinced* that existing arrangements governing internati cooperation in criminal justice must be regularly reviewed and revise ensure that the specific contemporary problems of fighting crime effectively addressed,

*Bearing in mind* that developing countries and countries with econo in transition may lack the resources for developing and implemen treaties on mutual assistance in criminal matters,

*Convinced* that complementing and supplementing the United Nat model treaties will contribute to increased efficiency in comba criminality,

*Recalling* its resolution 45/117 of 14 December 1990, in whic adopted the Model Treaty on Mutual Assistance in Criminal Matt annexed to that resolution,

*Also recalling* its resolution 52/88 of 12 December 1997,

*Commending* the work of the Intergovernmental Expert Group Mee on Mutual assistance in Criminal Matters, held at Arlington, Virginia, Un States of America, from 23 to 26 February 1998, to implement in General Assembly resolution 52/88 by proposing complement provisions for the Model Treaty elements for model legislation on mu assistance in criminal matters, and training and technical assistance national officials engaged in that field,

*Also commending* the Government of the United States of America hosting the Intergovernmental Expert Group Meeting, for its substan contribution to the organization of the Intergovernmental Expert Gr Meeting and for the support given by the National Institute of Justice of United States Department of Justice through the programme of the Uni Nations On-line Crime and Justice Clearing House,

1. *Welcomes* the report of the Intergovernmental Expert Group Meet on Mutual Assistance in Criminal Matters, held at Arlington, Virgi United States of America, from 23 to 26 February 1998;[1]

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* Resolution 53/112 adopted on 9 December1998 without a vote.

1. E/CN. 15/1998/7, annex.

2. *Decides* that the Model Treaty on Mutual Assistance in Criminal atters should be complemented by the provisions set forth in annex I to e present resolution;

3. *Encourages* Member States, within the framework of national legal stems, to enact effective legislation on mutual assistance, and calls upon e international community to give all possible assistance in order to ntribute to the achievement of that goal;

4. *Requests* the Secretary-General to elaborate, in consultation with ember States, for submission to the Commission on Crime Prevention d Criminal Justice, model legislation on mutual assistance in criminal atters, in order to enhance effective cooperation between States, taking to account the elements recommended by the Expert Group on Mutual ssistance in Criminal Matters for inclusion in such model legislation, hich are set forth in annex II to the present resolution;

5. *Invites* Member States to take into account the Model Treaty in egotiating treaties at the bilateral, regional or multilateral level, as ppropriate;

6. *Also invites* Member States to consider, where applicable and within e framework of national legal systems, the following measures in the ontext of the application of treaties on mutual assistance in criminal matters r other arrangements for such mutual assistance;

(*a*) Establishing or designating a national central authority or authorities process requests for assistance;

(*b*) Undertaking regular reviews of their treaties on mutual assistance criminal matters or other arrangements and implementing legislation, as ell as taking other necessary measures for the purpose of rendering such rangements and legislation more efficient and effective in combating stablished and emerging forms of crime;

(*c*) Concluding asset-sharing arrangements as a means of enabling rfeited proceeds of crime to be used to strengthen the capacity of national iminal justice systems and contributing a part of such proceeds to rogrammes such as those aimed at enhancing national capacities for ghting crime in developing countries and in countries with economies in ansition, paying due consideration to the rights to bona fide third parties;

(*d*) Making use of videoconferencing and other modern means of ommunication for, *inter alia*, transmission of requests, consultation etween central authorities, taking of testimony and statements, and aining;

7. *Encourages* Member States to promote, on a bilateral, regional or orldwide basis, measures to improve the skills of officials in order to

strengthen mutual assistance mechanisms, such as specialized trai and, whenever possible, secondment and exchanges of relevant perso and to consider the use of videconferencing and other modern mean communication for training purposes;

8. *Reiterates* its invitation to Member States to provide to the Secret General copies of relevant laws and information on practices relate international cooperation in criminal matters and, in particular, to mu assistance in criminal matters, as well as updated information on cer authorities designated to deal with requests;

9. *Requests* the Secretary-General;

(*a*) to regularly update and disseminate the information mentione paragraph 8 above and, in particular, to prepare, for use by Member Sta a directory of central authorities responsible for mutual legal assista drawing on the information already collected during the Intergovernme Expert Group Meeting;

(*b*) To continue to provide advisory and technical cooperation servi to Member States requesting assistance in drafting and implementi appropriate national legislation, and developing and implementing bilate subregional, regional or international treaties on mutual assistance criminal matters, drawing on the expertise of Member States as appropria

(*c*) To provide, in cooperation with interested Member States a relevant intergovernmental organizations, training on mutual assista law and practice for personnel in appropriate governmental agencies a for central authorities of requesting Member States in an effort to deve the necessary skills and to improve communication and cooperation aim at enhancing the effectiveness of mutual assistance mechanisms;

10. *Requests* the Secretary-General, in cooperation with interest Member States, relevant intergovernmental organization as and the institu constituting the United Nations Crime Prevention and Criminal Justi Programme network, to develop appropriate training materials for use providing to requesting Member States the technical assistance referred above;

11. *Commends* the International Institute of Higher Studies in Crimi Sciences of Siracusa, Italy, for its offer to organize and host up to t training seminars for mutual assistance officials, and invites interest Member States to provide voluntary contributions to offset the travel co of officials from developing countries and from countries with econom in transition and to make substantive contributions to the seminars;

12. *Urges* Member States and funding agencies to assist the Secreta General in implementing the present resolution through volunta

ontributions to the United Nations Crime Prevention and Criminal Justice und;

13. *Requests* the Secretary-General to ensure the full implementation f the provisions of the present resolution.

## ANNEX I

### Complementary provisions for the Model Treaty on Mutual Assistance in Criminal Matters

*Article 1*

1. In paragraph 3 (b), replace the words "Optional Protocol to" with he words" "article 18 of".

*Article 3*

2. In the title of article 3 replace the word "competent" with the word 'central".

3. Insert the world "central" before the word "authority".

4. Add the following footnote to the end of article 3:

"Countries may wish to consider providing for direct communications between central authorities and for the central authorities to play an active role in ensuring the speedy execution of requests, controlling quality and setting priorities. Countries may also wish to agree that the central authorities are not the exclusive channel for assistance between the Parties and that the direct exchange of information should be encouraged to the extent permitted by domestic law or arrangements."

*Article 4*

5. In the footnote to paragraph 1, replace the last sentence with the following:

"Countries may wish, where feasible, to render assistance, even if the act on which the request is based is not an offence in the requested State (absence of dual criminality). Countries may also consider restricting the requirement of dual criminality to certain types of assistance, such as search and seizure."

6. In paragraph 1 (d) delete the words "that is subject to investigation or protection in the requested State or".

7. Add the following footnote to the end of paragraph 4:

"States should consult in accordance with article 20 before assistance is refused or postponed."

*Article 5*

8. Add the following footnote to the end of paragraph 2:

"Countries may wish to provide that the request may be made modern means of communication, including in particularly urgent c verbal requests that are confirmed in writing forthwith."

*Article 6*

9. Add the following footnote to the end of article 6:

"The requested State should secure such orders, including judic orders, as may be necessary for the execution of the request. Countries m also wish to agree, in accordance with national legislation, to represent act on behalf or for the benefit of the requesting State in legal proceedi necessary to secure such orders".

*Article 8*

10. Add the following words to the end of the footnote to article 8

",or restrict use of evidence only where the requested State makes express request to that effect".

11. Add the following words to the beginning of article 8: "Unle otherwise agreed,".

*Article 11*

12. Add the following footnote to the end of paragraph 2:

"Wherever possible and consistent with the fundamental principles domestic law, the Parties should permit testimony, statements or oth forms of assistance to be given via video link or other modern means communication and should ensure that perjury committed under suc circumstances is a criminal offence."

*Article 12*

13. In the English version of paragraph 1, replace the word "require with the words "called upon".

14. Add the following footnote to the end of the article:

"Some countries may wish to provide that a witness who is testifyin in the requesting State may not refuse to testify on the basis of a privile applicable in the requested State".

*New article 18*

15. Insert as new article 18, entitled 'proceeds of crime", paragraphs

6 of the Optional Protocol to the Model Treaty on Mutual Assistance in iminal Matters concerning the proceeds of crime, and delete the remaining t of the Optional Protocol, including the footnotes.

16. Replace the word "Protocol" with the word "article" throughout the w article.

17. Add the following footnote to the end of the title of the new article:

"Assistance in forfeiting the proceeds of crime has emerged as an portant instrument in international cooperation. Provisions similar to se outlined in bilateral arrangements. One matter that could be considered the need for other provisions dealing with issues related to bank secrecy. ovisions could be made for the equitable sharing of the proceeds of crime tween the Contracting States or for consideration of the disposal of the oceeds on a case-by-case basis."

18. Add the following footnote to the end of paragraph 5:

"The Parties might consider widening the scope of the present article the inclusion of references to victims' restitution and the recovery of es imposed as a sentence in a criminal prosecution".

*Articles 18-21*

19. Renumber the former article 18 (it should become article 19) and number all subsequent articles accordingly.

## ANNEX II

### Elements recommended for inclusion in model legislation on mutual assistance in criminal matters

*A. General recommendation*

1. Model legislation on mutual assistance in criminal matters should flect in statutory terms the general provisions of the Model Treaty on utual Assistance in Criminal Matters, together with the recommendations ntained in annex I to the present resolution. To the extent possible, it ould provide different options for States with different legal systems. here relevant, it should take into account provisions of the model bill on utual assistance in criminal matters developed in 1998 by the United ations International Drug Control Programme.

*B. Scope*

2. The model legislation should provide a full range of flexible options r assuming mutual assistance obligations. When there is a treaty on utual assistance in criminal matters, the terms of that treaty should govern

the relationship. The legislation should also permit mutual assistance provided without a treaty, with or without reciprocity.

*C. Jurisdiction*

3. The model legislations could contain provisions to provid jurisdiction, *inter alia*:

(*a*) To issue judicial orders necessary for executing mutual assis requests;

(*b*) To authorize the requested State to act on behalf of or fo benefit of, or to represent the interests of, the requesting State in proceedings necessary for executing mutual assistance requests;

(*c*) To punish perjury committed during mutual assistance, in parti perjury committed during videoconferencing.

*D. Procedure*

4. The model legislation should include options for procedures dea with both incoming and outgoing requests for assistance in criminal mat Such procedures should be in conformity with, whenever applica international and regional human rights instruments. Where no tre provision is applicable, the legislation could also contain provisions specific forms of mutual assistance, including testimony and other fo of cooperation carried out via video link, cooperation in asset seizure forfeiture, and temporary transfer to witnesses in custody.

5. The model legislation could provide for the establishment of a cer authority or authorities for the receipt and transmission of requests and provision of advice and assistance to relevant authorities. The legisla could also specify the extent of the central authority's powers.

*E. Communications*

6. Where no treaty provision is applicable, the legislation should forth the means of communicating between the requesting State and requested State, allowing for use of the most modern forms communication.

## 15. International cooperation against the world drug problem*

*The General Assembly,*

*Recalling* its resolution 52/92 of 12 December 1997,

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* Resolution 53/115 adopted on 9 December1998 without a vote.

*Welcoming* the outcome of the twentieth special session of the General sembly devoted to countering the world drug problem together, held in w York from 8 to 10 June 1998, and the determination of Governments he highest political level to overcome the world drug problem by a full d balanced application of national, regional and international strategies reduce the illicit demand for, production of, and trafficking in drugs, as lected in the Political Declaration,[1] the Declaration on the Guiding nciples of Drug Demand Reduction,[2] and the measures to enhance ernational cooperation to counter the world drug problem,[3]

*Gravely concerned* that, despite continued increased efforts by States, evant international organizations, civil society and non-governemntal ganizations, there is a global expansion of the drug problem, which nstitutes a serious threat to the health, safety and well-being of all nkind, in particular young people, in all countries, undermines velopment, socio-economic and political stability and democratic titutions, entails an increasing economic cost for Governments, also eatens the national security and sovereignty of States, as well as the gnity and hope of millions of people and their families, and causes eparable loss of human lives,

*Deeply alarmed* by growing and spreading violence and economic wer of criminal organizations and terrorist groups engaged in drug fficking activities and other criminal activities, such as money-laundering d illicit traffic in arms, precursors and essential chemicals, and by the reasing transnational links between them, and recognizing the need for ernational cooperation and implementation of effective strategies on the sis of the outcome of the twentieth special session of the General sembly, which are essential to achieving results against all forms of nsnational criminal activities,

*Deeply convinced* that the special session made a significant contribution a new comprehensive framework for international cooperation, based an integrated and balanced approach with strategies, measures, methods, ctical activities, goals and specific targets to be met, and that all States, United Nations system, and other international organizations, must plement them with concrete actions and that the international financial titutions, such as the World Bank, and the regional development banks, ould be invited to include action against the world drug problem in their grammes, taking into account the priorities of States,

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Resolution S-20/2.
Resolution S-20/3.
Resolution S-20/4.

*Convinced* that civil society, including non-governmental organiz can make an effective contribution to and should play an active addressing the world drug problem,

Emphasizing the importance of the Declaration on the Gu Principles of Drug Demand Reduction[1] that introduces a global app recognizing a new balance between illicit supply and demand redu under the principle of shared responsibility, aims at preventing the drugs and at reducing the adverse consequences of drug abuse, p special attention to youth, and is one of the pillars of the new g strategy, and an important initiative of the United Nations Decade a Drug Abuse, 1991 2000, and reaffirming the need for demand redu programmes,

*Emphasizing* equally the importance of supply reduction as an in part within a balanced drug control strategy under the principles ensh in the Action Plan on International Cooperation on the Eradication of Drug Crops and on Alternative Development[2] and reaffirming the nee alternative development programmes,

*Underlining* the role of the Commission on Narcotic Drugs a principal United Nations policy-making body on drug control issues leadership role and commendable work of the United Nations Internat Drug Control Programme as the main focus for concerted multila action, and the important role of the International Narcotics Control B as an independent monitoring authority, as set out in the international control treaties,

*Recognizing* the efforts of countries that produce narcotic drug scientific and medical purposes to prevent the diversion of such substa to illicit markets and to maintain production at a level consistent with demand in line with the Single Convention on Narcotic Drugs of 19

*Acknowledging* that there are links, under certain circumstan between poverty and the increase in the illicit production of and traffic in narcotic drugs and psychotropic substances and that the promotio the economic development of countries affected by the illicit drug requires appropriate measures, including strengthened internati cooperation in support of alternative and sustainable development activ in the affected areas of those countries, which have as their objective reduction and elimination of illicit drug production,

*Stressing* that respect for all human rights is, and must be, an esse component of measures taken to address the drug problem,

1. Resolution S-20/3.
2. Resolution S-20/4 E.
3. United Nations, *Treaty Series*, vol. 520, No. 7515.

*Ensuring* that women and men benefit equally, and without any scrimination, from strategies directed against the world drug problem, ough their involvement in all stages of programmes and policy-making,

*Recognizing* that the use of the Internet poses new opportunities and allenges to international cooperation in combating drug abuse and illicit oduction and trafficking,

I

**Respect for the principles enshrined in the Charter of the United Nations and international law in the fight against the world drug problem**

1. *Reaffirms* that the fight against the world drug problem is a common d shared responsibility which must be addressed in a multilateral setting, quiring an integrated and balanced approach, must be carried out in full nformity with the purposes and principles of the Charter of the United tions and international law, and particularly with full respect for the vereignty and territorial integrity of States, the principle of non-tervention in internal affairs of States, and all human rights and ndamental freedoms;

2. *Calls upon* all States to take further actions to promote effective operation at the international and regional levels in the efforts to combat e world drug problem so as to contribute to a climate conducive to hieving that end, on the basis of the principles of equal rights and mutual spect;

3. *Urges* all States to ratify or accede to and implement all the provisions the Single Convention on Narcotic Drugs of 1961,[1] as amended by the 72 Protocol,[2] the Convention on Psychotropic Substances of 1971[3] and e United Nations Convention against Illicit Traffic in Narcotic Drugs and ychotropic Substances of 1988;[4]

II

**International cooperation to counter the world drug problem**

1. *Urges* competent authorities, at the international, regional and tional levels, to implement the outcome of the special session, within the

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United Nations, *Treaty Series*, vol. 520, No. 7515.

*Ibid.*, vol. 976, No. 14152.

*Ibid.*, vol. 1019, No. 14956.

See *Official Records of the United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 25 November-20 December 1988*, vol. I (United Nations publication, Sales No. E.94. XI.5).

agreed time-frames, in particular the high priority practical measures a international, regional or national level, as indicated in the Poli Declaration,[1] the Declaration on the Guiding Principles of Drug De Reduction,[2] and the measures to enhance international cooperati counter the world drug problem,[3] including the Action Plan against I Manufacture, Trafficking and Abuse of Amphetamine-type Stimulants their Precursors,[4] the measures to prevent the illicit manufacture, im export, trafficking and distribution of precursors used in the il manufacture of narcotic drugs and psychotropic substances,[5] the meas to promote judicial cooperation,[6] the measures to counter mo laundering,[7] and the Action Plan on International Cooperation on Eradication of Illicit Drug Crops and on Alternative Development;[8]

2. *Renews* its commitment to further strengthening internati cooperation and substantially increasing efforts to counter the world problem, in accordance with the obligations of States under the Un Nations drug control conventions, on the basis of the general framew given by the Global Programme of Action,[9] and the outcome of the spe session, and taking into account experience gained;

3. *Calls upon* all States to adopt effective measures, including nati laws and regulations, to implement the mandates and recommendation the Global Programme of Action, to strengthen national judicial syst and to carry out effective drug control activities in cooperation with o States in accordance with those international instruments, in orde implement the outcome and the goals of the special session;

4. *Calls upon* the relevant United Nations bodies, the speciali agencies, the international financial institutions and other concer intergovernmental and international organizations, within their manda and all actors of civil society, notably non-governemntal organizati community-based organizations, sports associations, the media and private sector, to cooperate more closely with Governments in their eff to promote and implement the actions of fulfil the Global Programme Action and the outcome of the special session;

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1. Resolution S-20/2.
2. Resolution S-20/3.
3 Resolution S-20/4.
4. Resolution S-20/4 A.
5. See resolution S-20/4 B.
6. Resolution S-20/4 C.
7. Resolution S-20/4 D.
8. Resolution S-20/4 E.
9. Resolution S-17/2, annex.

5. *Urges* Governments, relevant United Nations bodies, specialized ncies and other international organizations to assist and support, upon uest, transit States, in particular developing countries in need of such istance and support, aiming at enhancing their capacity of fight illicit fficking of narcotic drugs and psychotropic substances, and also phasizes the importance of national initiatives, as well as subregional, ional and international cooperation, in combating illicit drug trafficking;

6. *Reaffirms* that preventing the diversion of chemicals from legitimate nmerce to illicit drug manufacture is an essential component of a nprehensive strategy against drug abuse and trafficking, and takes note the progress made in developing practical guidelines, including those of International Narcotics Control Board and the recommendations in plementing article 12 of the 1988 Convention, and calls upon all States adopt and implement measures to prevent the diversion of chemicals to cit drug manufacture in accordance with the resolution on the control precursors, adopted at the special session;[1]

7. *Requests* the Executive Director of the United Nations International ug Control Programme to report to the Commission on Narcotic Drugs its forty-second session, in March 1999, on the follow-up to the Action an on International Cooperation on the Eradication of Illicit Drug Crops d on Alternative Development;[2]

8. *Requests* the Commission on Narcotic Drugs to examine, at its forty-cond session, the proposal for an action plan for the implementation of e Declaration on the Guiding Principles of Drug Demand Reduction, nich is being elaborated by the United Nations International Drug Control ogramme in consultation with Member States, taking into account the ernational agreements and declarations in the area of demand reduction at have been elaborated, in particular the Global Programme of Action,[3] d addressing all policies and programmes to all sectors of society;

9. *Requests* the Commission on Narcotic Drugs and the United Nations ernational Drug Control Programme to elaborate guidelines in order to cilitate reporting by Governments on the implementation of the Global ogramme of Action and progress achieved in meeting the goals and gets for the years 2003 and 2008, as set out in the Political Declaration[4] the special session, and to have an efficient collection of reliable data crease the number of Governments that report updated information on a gular basis, improve the quality of their responses, and avoid duplication

Resolution S-20/4 B.
Resolution S-20/4 E.
Resolution S-17/2, annex..
Resolution S-20/2.

of activities;

10. *Calls upon* the Commission on Narcotic Drugs to mainstrea gender perspective into all its policies, programmes and activities requests the Secretariat to integrate a gender perspective into documentation prepared for the Commission;

11. *Recalls* the World Programme of Action for Youth to the Year 2( and Beyond, adopted by the General Assembly on 14 December 19 and takes note with satisfaction of the active participation of yo organizations and youth during the special session, and stresses importance of their continuing to contribute their experiences and participate in the decision-making processes, in particular in relation to elaboration of the action play for the implementation of the Declaration the Guiding Principles of Drug Demand Reduction;

12. *Calls upon* States to adopt effective measures to stem the illicit tra in small arms, which, as a result of its close link to the illicit drug trade, generating extremely high levels of crime and violence within the societi of some States, threatening the national security and economies of tho States;

13. *Notes* the elaboration of an international convention again transnational organized crime by the year 2000, in the framework of th Commission on Crime Prevention and Criminal Justice;

14. *Reaffirms* the importance of achieving the objectives of the Unite Nations Decade against Drug Abuse, 1991-2000, under the theme " global response to a global challenge", by Member States, the Unite Nations International Drug Control Programme and the United Natio system;

## III

## Action by the United Nations system

1. *Reaffirms* the role of the Executive Director of the United Natio International Drug Control Programme in coordinating and providin effective leadership for all United Nations drug control activities so as increase cost-effectiveness and ensure coherence of action, as well coordination, complementarity and non-duplication of such activitie throughout the United Nations system;

2. *Emphasizes* the need to increase the efficiency of the United Natio System-wide Action Plan on Drug Abuse Control,[2] as a tool to promote th

1. Resolution 50/81.
2. See A/49/139-E/1994/57.

rdination and enhancement of drug abuse control activities within the ted Nations system;

3. *Urges* the specialized agencies, programmes and funds, including nanitarian organizations, and invites multilateral financial institutions, nclude action against the world drug problem in their programming and nning processes, in order to ensure that the integral and balanced strategy ich emerged from the special session devoted to countering the world g problem together is being addressed;

## IV

## United Nations International Drug Control Programme

1. *Welcomes* the efforts of the United Nations International Drug Control ogramme to implement its mandate with in the framework of the ernational drug control treaties, the Comprehensive Multidisciplinary tline of Future Activities in Drug Abuse Control,[1] he Global Programme Action,[2] the outcome of the special session of the General Assembly voted to countering the world drug problem together and relevant nsensus documents;

2. *Requests* the United Nations International Drug Control Programme:

(*a*) To strengthen cooperation with Member States, as well as with ited Nations programmes, funds and relevant agencies and non-vernmental organizations, and to provide, on request, assistance in plementing the outcome of the special session, which may include ustment of national laws and policies, development of training ogrammes and the establishment of mechanisms for data collection and alysis;

(*b*) To strengthen the dialogue and cooperation with multilateral velopment banks and with the international financial institutions so that y may undertake leading and programming activities related to drug ntrol in interested and affected countries to implement the outcome of special session, and to keep the Commission on Narcotic Drugs informed further progress made in this area;

(*c*) To continue, taking into account the outcome of the special session, include in its report on illicit traffic in drugs an updated assessment of rldwide trends in illicit traffic and transit in narcotic drugs and

See *Report of International Conference on Drug Abuse and Illicit Trfficking, Vienna, 17 26 June 1987* (United Nations publication, Sales No. E. 87.I.18), chap. I, sect. A

Resolution S-17/2, annex.

psychotropic substances, including methods and routes used, ar recommend ways and means of improving the capacity of States a those routes to deal with all aspects of the drug problem;

(*d*) To continue the publication of the *World Drug Report* comprehensive and balanced information about the world drug prob and to seek additional extrabudgetary resources for its publication i official languages;

3. *Invites* Governments and the United Nations International D Control Programme to consider ways and means of improving coordination of United Nations activities related to the world drug prob so as to avoid duplication of such activities, strengthen the efficiency accomplish the goals approved by Governments;

4. *Urges* all Governments to provide the fullest possible financial political support to the Programme by widening its donor-base increasing voluntary contributions, in particular general-purp contributions, to enable it to continue, expand and strengthen its operatio and technical cooperation activities;

5. *Urges* the International Narcotics Control board to increase effo to implement all its mandates under international drug control conventio and to continue to cooperate with Governments, including by offeri advice and technical support to Member States that request it;

6. *Notes* that the International Narcotics Control Board needs suffici resources to carry out all its mandates, and therefore urges Member Sta to commit themselves in a common effort to assigning adequate a sufficient budgetary resources to the Board, in accordance with Econor and Social Council resolution 1996/20 of 23 July 1996, and emphasi the need to maintain its capacity, including through the provision appropriate means by the Secretary-General and adequate technical supp by the United Nations International Drug Control Programme;

7. *Stresses* the importance of the meetings of the Heads of Natio Drug Law Enforcement Agencies and the Subcommission on Illicit Dr Traffic and Related Matters in the Near and Middle East, and encoura them to continue contributing to strengthening regional and internatio cooperation, taking into account the outcome of the special session;

8. *Takes note* of the reports of the Secretary-General,[1] and, taking in account the promotion of integrated reporting, requests the Secreta General to submit to the General Assembly at its fifty-fourth sessio report on the implementation of the outcome of the twentieth special sessi and the present resolution.

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1. A/53/83, A/53/383 and A/53/128-E/1998/58.

## 16, Assistance to unaccompanied refugee minors*

*The General Assembly,*

*Recalling* its resolutions 49/172 of 23 December 1994, 50/150 of 21 December 1995, 51/73 of 12 December 1996 and 52/105 of 12 December 1997,

*Aware* of the fact that the majority of refugees are children and women,

*Bearing in mind* that unaccompained refugee minors are among the most vulnerable refugees and the most at risk of neglect, violence, forced military recruitment, sexual assault and other abuses and therefore require special assistance and care,

*Mindful* of the fact that the ultimate solution to the plight of unaccompanied minors is their return to and reunification with their families,

*Noting* the revised Guidelines on Refugee Children issued by the Office of the United Nations High Commissioner for Refugees in May 1994 and the development of an emergency kit to facilitate coordination and to enhance the quality of responses to the needs of unaccompanied minors by the Office of the High Commissioner, the United Nations Children's Fund and non-governmental organizations,

*Noting with appreciation* the efforts of the Office of the High Commissioner for Refugees and the United Nations children's Fund in the identification and tracing of unaccompanied refugee minors, and welcoming their efforts in reunifying family members of refugees,

*Welcoming* the efforts exerted by the United Nations High Commissioner for Refugees for the reunification of family members of refugees,

*Noting* the efforts of the High Commissioner to ensure the protection of and assistance to refugees, including children and unaccompanied minors, and that further efforts need to be exerted to this effect,

*Recalling* the provisions of the Convention on the Rights of the Child[1] and the 1951 Convention[2] and the 1967 Protocol[3] relating to the Status of Refugees,

1. *Takes note* of the report of the Secretary-General;[4]

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* Resolution 53/122 adopted on 9 December1998 without a vote.

1. Resolution 44/25, annex.
2. United Nations, *Treaty Series*, vol. 189, No. 2545.
3. *Ibid.*, vol. 606, No. 8791.
4. A/53/325.

2. *Also takes note* of the report of the Special Representative of Secretary-General for Children and Armed Conflict;[1]

3. *Expresses its deep concern* at the continued plight of unaccompa refugee minors, and emphasizes once again the urgent need for their e identification and for timely, detailed and accurate information on t number and whereabouts;

4. *Expresses* the hope once again that adequate resources will provided for programmes of identification and tracing of unaccompan refugee minors;

5. *Calls upon* the Office of the United Nations High Commissioner Refugees, in cooperation with other relevant United Nations bodies, incorporate into its programmes policies that aim at preventing refug family separation, conscious of the importance of family unity;

6. *Calls upon* all Governments, the Secretary-General, the Office of t High Commissioner, all United Nations organizations, other internation organizations and non-governmental organizations concerned to exert t maximum effort to assist and protect refugee minors and to expedite t return to and reunification with their families of unaccompanied refug minors;

7. *Urges* the Office of the High Commissioner, all United Natio organizations, other international organizations and non-goverment organizations concerned to take appropriate steps to mobilize resourc commensurate with the needs and interests of unaccompanied refug minors and for their reunification with their families;

8. *Calls upon* all States and other parties to armed conflict to respe international humanitarian law and, in this regard, calls upon States parti to respect fully the provisions of the Geneva Conventions of 12 Augu 1949[2] and related instruments, while bearing in mind resolution 2 adopte at the twenty-sixth International Conference of the Red Cross and Re Crescent held at Geneva in December 1995, and to respect the provisio of the Convention on the Rights of the Child,[3] which accord childre affected by armed conflict special protection and treatment;

9. *Condemns* all acts of exploitation of unaccompanied refugee minor including their use as soldiers or human shields in armed conflict and the forced recruitment into military forces, and other acts that endanger the safety and personal security;

1. A/53/482, annex.
2. United Nations, *Treaty Series*, vol. 75, Nos. 970-973.
3. Resolution 44/25, annex.

10. *Calls upon* the Secretary-General, the United Nations High mmissioner for Refugees, the Office for the Coordination of Humanitarian fairs of the Secretariat, the United Nations Children's Fund, other United tions organizations and other international organizations to mobilize equate assistance to unaccompanied refugee minors in the areas of relief, ucation, health and psychological rehabilitation;

11. *Encourages* the Special Representative of the Secretary-General Children and Armed Conflict in his efforts to raise awareness worldwide d to mobilize official and public opinion for the protection of children ected by armed conflict, including refuges minors;

12. *Requests* the Secretary-General to report to the General Assembly its fifty-fourth session on the implantation of the present resolution and give special attention to the girl-child refugee in his report.

## 17. The rights of the child*

*e General Assembly,*

*Recalling* its resolutions 52/107 of 12 December 1997 and 52/106 of December 1997 and Commission on Human Rights resolution 1998/76 22 April 1998,[1]

*Reaffirming* that the best interest of the child shall be the primary nsideration in all actions concerning children,

*Reaffirming* the World Declaration on the Survival, Protection and evelopment of Children and the Plan of Action for Implementing the orld Declaration on the Survival, Protection and Development of Children the 1990s adopted by the World Summit for Children, held in New York 29 and 30 September 1990,[2] notably its solemn commitment to give gh priority to the rights of children, to their survival and to their protection d development, and reaffirming the Vienna Declaration and Programme Action adopted by the World Conference on Human Rights, held at enna from 14 to 25 June 1993,[3] which, *inter alia*, states that national and ernational mechanisms and programmes for the defence and protection children, in particular those in especially difficult circumstances, should straightened, including through effective measures to combat

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Resolution 53/128 adopted on 9 December1998 without a vote.
Official Records of the Economic and Social Council, 1998, Supplement No. 3 (E/1998/23), chao. II, sect. A.
A/45/625, annex.
A/CONF. 157/24 (Part I), chap. III.

exploitation and abuse of children such as female infanticide, har child labour, sale of children and organs, child prostitution and pornography, and which reaffirms that all human rights and fundam freedoms are universal,

*Underlining* the need for mainstreaming gender perspective int policies and programmes relating to children,

*Welcoming* that the special situation of children has been taken account in the conclusion of the United Nations Diplomatic Conferenc Plenipotentiaries on the Establishment of an International Criminal C guided by the principles and provisions of the Convention on the Ri of the Child,[1]

*Profoundly concerned* that the situation of children in many parts of world remains critical as a result of poverty, inadequate social and econo conditions aggravated by the current international financial crisis in increasingly globalized world economy, pandemics, natural disast armed conflicts, displacement, exploitation, illiteracy, hunger, intolera and suitability and inadequate legal protection, and convinced that urg and effective national and international action is called for,

*Recognizing* that legislation alone is not enough to prevent violati of the rights of the child, that stronger political commitment is needed that Governments should implement their laws and complement legislat measures with effective action,

*Recommending* that, within their mandates, all relevant human rig mechanisms and all other relevant organs and mechanisms of the Uni Nations system and the supervisory bodies of the specialized agencies attention to particular situations in which children are in danger and wh their rights are violated and that they take in to account the work of Committee on the Rights of the Child, and welcoming the rights-bas approach adopted by the United Nations Children's Fund and the st taken to further increase system-wide coordination and inter-agen cooperation for the promotion and protection of the rights of the chil

*Recalling* the important open debate, and the statement made by President of the Security Council on behalf of the Council on 29 June 19 on children and armed conflict,[2]

*Stressing* the need to strengthen partnerships between Governmen international organizations and all sectors of civil society, in particu non-govermental organizations,

1. Resolution 44/25, annex.
2. S/PRST/1998/18.

I

## Implementation of the Convention on the Rights of the Child

1. *Welcomes* the unprecedented number of one hundred and ninety-e States that have ratified or acceded to the Convention on the Rights of e Child[1] as a universal commitment to the rights of the child;

2. *Once again urges* all States that have not yet done so to sign and tify or accede to the Convention as a matter of priority, with a view to aching the goal of universal adherence by the tenth anniversaries of the orld Summit for Children and of the entry into force of the Convention;

3. *Takes note* of the report of the Committee on the Rights of the Child,[2] d recognizes its important role in creating awareness of the principles d provisions of the Convention and in providing recommendations to ates parties on its implementation;

4. *Invites* the Committee on the Rights of the Child to further enhance e constructive dialogue with the States parties and the transparent and fective functioning of the Committee;

5. *Welcomes* the fact that the Committee on the Rights of the Child held thematic discussion on the rights of children living in a world with human mmunodeficiency virus/acquired immunodeficiency syndrome (HIV/ IDS), and urges Governments, in cooperation with United Nations bodies nd organizations, in particular the Joint and Co-Sponsored United Nations rogramme on Human Immunodeficiency Virus/Acquired mmunodeficiency Syndrome, the United Nations Children's Fund, the nited Nations Population Fund, the United Nations Development rogramme, the United Nations Educational, Scientific and Cultural rganization, the World Health Organization and the World Bank, to adopt l appropriate measures with a view to the realization of the their rights;

6. *Reaffirms* the rights of all children affected by pandemics, particularly ose living in a world with HIV/AIDS, to have access to health, eduction nd social services and to be protected from all forms of discrimination, ouse or neglect;

7. *Welcomes* the increased attention given by the Committee on the ights of the Child to the realization of the highest attainable standards of ealth and access to health acre, and welcomes World Health Assembly esolution WHA/51.22 of 16 May 1998 on the health of children and dolescents;

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Resolution 44/25, annex.

*Official Records of the General Assembly, Fifty-third Session, Supplement No. 41* (A/53/41)

8. *Invites* States parties, when reporting to the Committee on the R of the Child on the implementation of article 7 of the Conventio provide information, in accordance with the reporting guidelines o Committee, on their levels of birth registration and other relevant da this regard;

9. *Requests* the Secretary-General to ensure the provision of approp staff and facilities for the effective and expeditious performance of functions of the Committee on the Rights of the Child, and takes note of Plan of Action of the United Nations High Commissioner for Human Ri to strengthen the implementation of the Convention on the Rights of Child and of the steps taken to ensure temporary support to the Commi in the framework to the Plan of Action;

10. *Calls upon* States parties to implement fully the Convention, cooperate closely with the Committee on the Rights of the Child and comply in a timely manner with their reporting obligations under Convention, in accordance with the guidelines elaborated by Committee;

11. *Expresses its concern* at the great number of reservations to Convention, and urges States parties to withdraw reservations incompati with the object and purpose of the Convention and to consider reviewi other reservation with a view to withdrawing them;

12. *Calls upon* States parties to take appropriate measures so th acceptance of the amendment to paragraph 2 of article 43 of the Conventi by a two-thirds majority of States parties can be reached as soon as possib in order for the amendment to enter into force, increasing the membersh of the Committee on the Rights of the Child from ten to eighteen exper

13. *Calls upon* States parties to the Convention to ensure that t education of the child shall be carried out in accordance with article 29 the Convention and that the education shall be directed, *inter alia*, to t development of respect for human rights and fundamental freedoms, f the Charter of the United Nations and for different cultures and to t preparation of the child for responsible life in a free society, in the spirit understanding, peace, tolerance, gender equality and friendship amo peoples, ethnic, national and religious groups and persons of indigeno origin;

14. *Calls upon* States parties to the Convention, in accordance wi their obligation under article 42 of the Convention, to make the principl and provisions of the Conventions widely known to adults and childr alike, and also calls upon States parties to encourage training on the rig of the child for those involved in activities concerning children, for examp through the programme of advisory services and technical cooperation

e field of human rights;

15. *Stresses* that the implementation of the Convention contributes to e achievement of the goals of the World Summit for Children, as nphasized in the report the Secretary-General on progress at mid-decade n the implementation of General Assembly resolution 45/217 of 21 ecember 1990[1] and in his report on progress on the implementation of the Vorld Declaration and Plan of Action of the World Summit for Children;[2]

16. *Encourages* the Committee, in monitoring the implementation of e convention on the Rights of the Child, to continue to pay attention to e needs of children in especially difficult circumstances;

17. *Welcomes* the positive results of the cooperation between the ommittee on the Rights of the Child and the United Nations Children's und, supports the rights-based approach adopted by the Children's Fund, nd encourages its further development;

II

**Children with disabilities**

1. *Welcomes* the increased attention given by the Committee on the ights of the Child to the equal enjoyment by children with disabilities of e rights of the child, and takes note of the thematic discussion held in 997 on the rights of children with disabilities, as well as the ecommendations adopted;

2. *Also welcomes* the decision by the Committee on the rights of the hild to set up a working group to elaborate a plan of action for the ommittee's future work on behalf of children with disabilities;

3. *Calls upon* all States to take all necessary measures to ensure the full nd equal enjoyment of all human rights and fundamental freedoms by hildren with disabilities and to develop and enforce legislation against iscrimination against children with disabilities;

4. *Also calls upon* all States to promote for children with disabilities a ıll and decent life, in conditions which ensure dignity, promote self-eliance and facilitate the child's active participation in the community, ncluding effective access to education and health services;

5. *Emphasizes* the right to education as a human right, and calls upon tates to make education accessible to children with special educational eeds in a manner conducive to the child's achieving the fullest possible ocial integration and individual development and to adopt an integrated

A/51/256.
A/53/186.

approach to providing adequate support and appropriate education such children;

6. *Recognizes* the work done by the Special Rapporteur of Commission for Social Development on disability, encourages him continue to pay special attention to children with disabilities, and welco the invitation by the Economic and Social Council in its resolut 1997/20 to enhance cooperation between the Special Rapproteur and Committee on the Rights of the Child;

7. *Calls upon* all States, in complying with their reporting obligati to the Committee under paragraph 1 of article 44 of the Convention, include, in accordance with the Committee's guidelines, information the situation and the needs of children with disabilities, includi disaggregated data, and on the measures taken to ensure to such childr their enjoyment of the rights under the Convention;

## III

## Prevention and eradication of the sale of children and of their sexual exploitation and abuse, including child prostitution and child pornography

1. *Welcomes* the interim report of the Special Rapporteur of th Commission on Human Rights on the sale of children, child prostitutio and child pronogaphy,[1] which this year focuses on the issues of sale ar trafficking of children, for all purposes of commercial sexual exploitatio or otherwise, and expresses its support for her work;

2. *Requests* the Secretary-General to provide the Special Rapporte with all necessary human and financial assistance to enable her to dischar her mandate fully;

3. *Supports* the work of the open-ended inter-sessional working grou of the Commission on Human Rights on the elaboration of a draft option protocol to the Convention on the Rights of the Child related to the sale children, child prostitution and child pornography, and expresses the hop that it will make further progress prior to the fifty-fifth session of th Commission with a view to finalizing that work before the tenth anniversa of the Convention on the Rights of the Child;

4. *Invites* Governments, relevant specialized agencies, the Committe on the Rights of the Child, the relevant special rapporteure ar intergovernmental and non-governmental organizations to provic comments, *inter alia*, on the scope of the optional protocol, prior to the ne session of the working group;

1. A/53/311.

5. *Calls upon* all States parties to fulfil their obligation under article 34 he Convention, and also calls upon all States to support efforts in the text of the United Nations system aimed at adopting effective national, teral and multilateral measures for the prevntion and eradication of the of children and of their sexual exploitation and abuse, including child stitution and child pornography;

6. *Calls upon* States to criminalize all forms of sexual exploitation of dren, including commercial sexual exploitation, and to condemn and alize all those offenders involved, whether local or foreign, while uring that children victims of this practice are not penalized;

7. *Also upon* States to enact and enforce appropriate laws and to design implement policies and programmes to protect children from sexual loitation and abuse, in particular child prostitution, child pornography child sex tourism;

8. *Further calls* upon States to review and revise, where appropriate, s, policies, programmes and practices to eliminate all forms of sexual loitation and abuse of children, including commercial sexual loitation;

9. *Requests* all States to implement, on an urgent baiss, measures to tect children from all forms of sexual exploitation and abuse, including asures in line with those outlined in the Declaration and Agenda for tion of the World Congress against Commercial Sexual Exploitation of ildren, held at Stockholm from 27 to 31 August 1996;[1]

10. *Encourages* regional and interregional efforts, such as the Child lfare Experts' Conference of the Asia-Europe Meeting, held in London m 6 to 8 October 1998, to follow up the implementation of the Agenda Action of the World Congress against Commercial Sexual Exploitation Children, with the objective of identifying best practices and issues uiring particularly urgent action;

11. *Encourages* Governments to consult and facilitate the active ticipation of children who have been victims of sexual exploitation or ise in the development and implementation of strategies to protect ldren from all forms of sexual exploitation and abuse;

12. *Stresses* the need to combat the existence of a market that encourages h criminal practices against children, including through preventive and orcement measures targeting customers or individuals who sexually loit or sexually abuse children;

13. *Requests* States to increase cooperation and concerted action by evant law enforcement authorities and institutions, with a view to

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A/51/385, annex.

dismantiling national, regional and international networks traffick children;

14. *Also requests* States to increase cooperation and concerted a at the national, regional and international levels, to enforce measur combat effectively all forms of sexual exploitation and abuse of chil in particular paedophilia, child sex tourism, child prostitution and pornography, in particular its dissemination through the Internent;

15. *Urges* States, in cases of child sex tourism, to develop or streng and implement laws to criminalize the acts of nationals of the countri origin when committed against children in the countries of destinatio ensure that a person who exploits a child for sexual abuse purpose another country is prosecuted by competent national authorities, eith the country of origin or in the country of destination, to strengthen laws law enforcement, including confiscation and seizure of assets and pr and other sanctions, against those who commit sexual crimes aga children in countries of destination and to share relevant data;

16. *Invites* States and relevant United Nations bodies and agencie allocate appropriate resources for comprehensive and gender-sensi programmes to physically and psychologically rehabilitate child vict of trafficking and of any form of sexual exploitation and abuse and to all appropriate measures to promote their full recovery and so reintegration;

## IV

## Protection of children affected by armed conflict

1. *Expresses grave concern* at the numerous damaging effects of ar conflicts on children, and emphasizes the need for the world commu to focus increased attention on this serious problem with a view to bring it to an end;

2. *Welcomes* the report of the Special representative of the Secret General for Children and Armed Conflict,[1] and expresses its support for work for children affected by armed conflict, in particular his effort raise worldwide awareness and to mobilize official and public opinion the protection of children affected by armed conflict, including thro field visits, with the consent of the State concerned, in order to prom respect for children's rights and needs in conflict and post-conflict situati

3. *Notes* that, without adequate human resources, the effectiveness the Special Representative will continue to be severely constrained, c upon the Secretary-General to ensure that the necessary support is m

1. A/53/482.

ailable expeditiously to the Special Representative for the effective rformance of his mandate, encourages the United Nations Children's nd, the Office of the United Nations High Commissioner for Refugees d the Office of the United Nations High Commissioner for Human Rights continue to provide support to the Special Representative, and calls on States and other institutions to provide voluntary contributions to the ecial Representative;

4. *Calls upon* the Special Representative and all relevant parts of the ited Nations system to continue do develop a concerted approach to the hts, protection and welfare of children affected by armed conflict, in der to place this issue with in the mainstream of United Nations policy-king and programme activities and to increase cooperation within their spective mandates, including, as appropriate, in the follow-up to the commendations and field visits of the Special Representative;

5. *Invites* Governments, regional orgnizations, intergovernmental ganizations and non-governmental organizations to continue to cooperate th the Special Representative, taking into account his recommendations, d, in this context, welcomes the initiative of the Special Representative r a series of regional symposia on children and armed conflict, the first which was held in London in June 1998, the others planned for Tokyo d for other regions;

6. *Welcomes* the information provided by the Special Representative in s report on field missions and country initiatives, calls upon Governments d other parties in the countries cocerned to implement the commitments ey have undertaken, and invites them to consider carefully and to address e recommendations of the Special Representative;

7. *Invite* the Special Representative to continue to include in his reports formation on his field visits, including recommendations and, as propriate, commitments obtained as well as follow-up to them;

8. *Invites* all States to accede to relevant international human rights and manitarian law instruments, and urges them to implement those struments to which they are parties;

9. *Calls upon* all States and other parties to armed conflict to respect ernational humanitarian law, and, in this regard, calls upon States parties respect fully the provisions of the Geneva Conventions of 12 August 49[1] and the additional protocols thereto of 1977;[2]

10. *Urges* States and all other parties to armed conflict to adopt all cessary measures to end the use of children as soldiers and to ensure their mobilization and effective disarmament;

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United Nations, *Treaty Series*, vol. 75, Nos. 970-973.

*Ibid.*, vol 1125, Nos. 17512 and 17513.

11. *Calls upon* States, United Nations bodies and agencies and o relevant humanitarian organizations to give priority to the respect fo rights of the child in complex humanitarian emergencies, in partic armed conflicts and post-conflict situations, and to integrate those ri into all humanitarian and development activities, including emerge relief operations, country programmes and field operations aime promoting peace, preventing and resolving conflicts and implemen peace agreements;

12. *Urges* all Governments and parties in complex humanita emergencies, in particular armed conflicts and post-conflict situations ensure the safe and unhindered access of humanitarian personne conformity with the relevant provisions of international law and natio laws, so as to allow them to efficiently perform their task of assist children;

13. *Urges* States to ensure effective measures for the rehabilitati physical and psychological recovery and reintegration into society children affected by armed conflict, child soldiers, victims of landmi and other weapons and victims of gender-based violence, *inter alia*, throu adequate education and training, and invites the international commun to assist in this endeavour;

14. *Stresses* the importance of promoting and supporting lo capacities to address at the local level, including through advocacy, issue of children and armed conflict;

15. *Underlines* the importance of including relevant measures to ens respect for the rights of the child in the areas of health and nutrition, form informal or non-formal education, physical and psychological recov and social reintegration, be included inemergency and other humanitar assistance policies and programmes;

16. *Stresses* the urgent need to raise the current human rights standa set by article 38 of the Convention on the Rights of the Child, supports work of the open-ended inter-sessional working group of the Commiss on Human Rights on a draft optional protocol to the convention on Rights of the Child related to the involvement of children in armed confl and the task given to the chairperson of the working group by Commission in its resolution 1998/76[1] to undertake broad inform consultations with a view to presenting a progress report to the worki group at its next meeting, and expresses the hope that it will make furt progress prior to the fifty-fifty session of the Commission with a view finalizing this work;

1. *Official Records of the Economic and Social council, 1998, supplement No. 3* 1998/23), chap. II, sect. A.

17. *Welcomes* the ongoing efforts to bring to an end the use of children soldiers, and, in this context, recognizes the contribution of the United tions Diplomatic Conference of Plenipotentiaries on the Establishment an International Criminal Court and recalls the qualification in the statute the Court of the conscription, enlistment or use to participate actively in stilities of child soldiers as a war crime, which will make it possible to d impunity for the perpetrators of such crimes;

18. *Notes* with concern the impact of small arms and light weapons on ildren in situations of armed conflict, in particular a result of their illicit oduction and traffic, and calls upon States to address this problem;

19. *Welcomes* increased international efforts invarious with respect to ti-personnel mines, recognizes the positive effect on children of those forts, and, in this regard, takes due note of the entry into force on 1 March 999 of the Convention on the Prohibition of the Use, Stockpiling, oduction and Transfer of Anti-Personnel Mines and on Their Destruction d its implementation by those States that become parties to it, as well as the entry into force on 3 December 1998 of the amended Protocol on ohibitions or Restrictions on the Use of Mines, Booby-traps and Other evices (Protocol I)[1] to the Convention on Prohibitions or Restrictions on e Use of Certain Conventional Weapons Which May Be Deemed to Be xcessively Injurious or to Have Indiscriminate Effects[2] and its nplementation by those States that become parties to it;

20. *Calls upon* States and relevant United Nations bodies to continue support national and international mine action efforts, including by ontinuing to contribute to the United Nations Voluntary Trust Fund for ssistance in Mine Clearance, and to take further action to promote gender- nd age-appropriate mine-awareness programmes, victim assistance and ild-centred rehabilitation, thereby reducing the number and the plight of ild victims;

21. *Reaffirms* that rape in the conduct of armed conflict constitutes a ar crime and that under certain circumstances it constitutes a crime against umanity and an act of genocide, as defined in the Convention on the evention and Punishment of the Crime of Genocide,[3] and calls upon all ates to take all mesures required for the protection of women and children om all acts of gender-based violence, including rape, sexual exploitation d forced pregnancy, to strengthen mechanisms to investigate and punish l those responsible and bring the perpetrators to justice;

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See CCW/CONF. I/16 (Part I).

See *The United Nations Disarmament Yearbook*, vol. 5: 1980 (United Nations publication, Sales No. E.81.IX.4), appendix XVII.

Resolution 260 A (III).

22. *Condemns* the abduction of children in situations of armed conf and urges States, international organizations and other concerned pa to take all appropriate measures to secure the unconditional release o abducted children;

23. *Recommends* that whenever sanctions are imposed their impac children be assessed and monitored and that humanitarian exceptions child-focused and formulated with clear guidelines for their applicati

24. *Recalls* the importance of preventive measures such as ea warning systems, preventive diplomacy and education for peace to prev conflicts and their negative impact on the rights of the child, and ur Governments and the international community to promote sustaina human development;

25. *Calls upon* all States, in accordance with the norms of internatio humanitarian law, to integrate in the training and gender-sensitiz education programmes of their armed forces, including those f peacekeeping, insturction on responsibilities towards the civili population, in particular women and children;

26. *Invites* Member States and relevant United Nations bodies and no gopvernmental organizations to consider the issue of how the impact armed conflict on children can best be integrated into events designed commemorate the tenth anniversary of the World Summit for Children a the entry into force of the Convention;

## V

## Refugee and internally displaced children

1. *Urges* Governments to pay particular attention to the situation refugee and internally displaced children by continuing to design a improve the implementation of policies and programmes for their care a well-being with the necessary international cooperation, in particular wi the Office of the Untied Nations High Commissioner for Refugees, t United Nations Children's Fund and international humanitari organizations;

2. *Calls upon* States and United Nations bodies, in recognizing t particular vulnerability of refugee and internally displaced children, protect both their safety and their developmental needs, including healt education and psycho-social rehabilitation, and expresses its concern abo adolescents in refugee camps, girls in particular, who are at risk of gende based violence and sexual exploitation and abuse;

3. *Expresses its deep concern* about the growing number unaccompanied refugee and internally displaced children, and calls up

States and United Nations bodies and agencies to ensure the early ntification and registration of unaccompanied refugee and internally placed children, to give priority to programmes for family tracing and ınification and to continue monitoring the care arrangements for accompanied refugee and internally displaced children;

4. *Calls upon* all States and other parties to armed conflicts to recognize particular vulnerability of refugee and internally displaced children to damaging effects of such conflicts, stresses the special vulnerability of ild-headed households, and calls upon Governments and United Nations dies to give these situations urgent attention, to enhance protection and sistance mechanisms and to involve women and youth in the design, livery and monitoring of measures taken to this effect;

5. *Notes* the adoption by the Inter-Agency Standing Committee of the uiding Principles on Internal Displacement, and invites the representative the Secretary-General on internally displaced persons to pay special tention to the situation of internally displaced children in his work and to ntinue working closely with the Emergency Relief Coordinator and all encies and organizations involved;

## VI

## Elimination of the exploitation of child labour

1. *Reaffirms* the right of the child to be protected from economic ploitation and from performing any work that is likely to be hazardous or interfere with the child's education, or to be harmful to the child's alth or physical, mental, spiritual, moral or social development;

2. *Welcomes* the measures taken by Governments to eliminate the ploitation of child labour, while recalling the Programme of Action for e Elimination of the Exploitation of Child Labour,[1] and calls upon relevant nited Nations agencies, in particular the United Nations Children's Fund d the International Labour Organization, to continue to support national forts in this regard;

3. *Also welcomes* the recent holding of various international conferences various forms of child labour;

4. *Further welcomes* the efforts by the Committee on the Rights of the ild in the area of child labour, takes note of its recommendations,[2] and

*Official Records of the Economic and Social Council, 1993, Supplement No. 3* (E/1993/23), chap. II, sect. A, resolution 1993/79, annex.

*Official Records of the Genral assembly, Fifty-third Session, Supplement No. 41* (A/53/41).

encourages the Committee as well as other relevant human rights t
bodies, within their respective mandates, to continue to monitor this gro
problem he examining reports of States parties;

5. *Calls upon* all States to translate into concrete action their commit
of the progressive and effective elimination of all forms of exploit
child labour, and urges hem, as a matter of priority, to eliminate the w
forms of child labour, such as forced labour, bonded labour and o
forms of slavery;

6. *Calls upon* all States that have not yet done so to consider ratif
the conventions of the International Labour Organization concerning
abolition of forced labour and the minimum age for employment, inclu
for particularly hazardous work for children, and to implement th
conventions;

7. *Encourages* the negotiations in the International Labour Orgniza
of a new convention on the elimination of the worst forms of child lab
and calls upon States to actively support a prompt and successful conclu
in 1999;

8. *Calls upon* all States to set specific target dates for eliminating
forms of child labour that are contrary to accepted international standar
for ensuring the full enforcement of relevant existing laws and, wh
appropriate, enacting legislation necessary to implement their obligati
under the Convention on the Rights of the Child and International Lab
Organization standards ensuring the protection of working children;

9. *Recognizes* that primary education is one of the main instruments
reintegrate child workers, and calls upon all States to recognize the ri
to education by making primary education compulsory and to ensure t
all children have access to free primary education as a key strategy
prevent child labour;

10. *Welcomes*, in this context, the appointment of a special rapport
whose mandate will focus on the right to education, and recognizes the r
that the special rapporteur could play in the efforts of States, in particu
in the field of primary education;

11. *Calls upon* all States to systematically assess and examine, in cl
cooperation with international organizations such as the Internatio
Labour Organization and the United Nations Children's Fund, t
magnitude, nature and causes of the exploitation of child labour and
develop and implement strategies for combating these practices, with
specific emphasis on the situation of girls, their right to education a
access to schools on an equal basis with boys, in close cooperation with
United Nations Educational, Scientific and Cultural Organization;

12. *Calls upon* all States and the United Nations system to strengthen nternational cooperation as a means of assisting Governments in preventing r combating violations of the rights of the child, including the exploitation f child labour;

## VII

### The plight of children living and/or working on the streets

1. *Expresses grave concern* at the large number of children living and/ r working on the streets and at the continuing growth in incidents and eports worldwide of such children being affected by serious crime, drug rafficking and abuse, violence and prostitution;

2. *Welcomes* the continuing efforts of Governments, the United Nations ystem, and civil society to tackle this multifaceted problem;

3. *Calls upon* Governments to continue actively to seek comprehensive olutions to the problems of children living and/or working on the streets, ncluding by helping to alleviate the poverty of such children, their families or guardians, by taking measures to ensure their reintegration into society and by providing, *inter alia*, adequate nutrition, shelter, health care and education, taking into account that such children are particularly vulnerable to all forms of violence, abuse, exploitation and neglect;

4. *Emphasizes* that the provisions of the Convention on the Rights of the Child and other relevant human rights instruments must constitute the standard in efforts to deal with this problem, and recommends that the Committee on the Rights of the Child and other relevant human rights treaty monitoring bodies continue to give attention to it when examining the reports of States parties;

5. *Strongly urges* all Governments to guarantee the respect for all human rights and fundamental freedoms, particularly the right to life, to take urgent measures to prevent the killing of children living and/or working on the streets, to combat torture and violence against them, to bring the perpetrators to justice and to ensure strict compliance with the Convention on the Rights of the Child and other relevant human rights instruments, including the requirement that legal and juridical processes respect the rights of the child;

6. *Calls upon* the international community to support, through effective international cooperation, the efforts of States to improve the situation of such children, and encourages States parties to the Convention on the Rights of the Child, in preparing their reports to the Committee on the Rights of the Child, to take full account of the particular needs and rights

of such children and to consider requesting technical advice and assista
for initiatives aimed at improving their situation;

VIII

*Decides*

(*a*) To request the Secretary-General to submit a report on the rights the child to the General Assembly at its fifty-fourth session contain information on the status of the Convention on the Rights of the Child a the problems addressed in the present resolution;

(*b*) To request the Special Representative of the Secretary-General Children and Armed Conflict to submit to the General Assembly and t Commission on Human Rights reports containing relevant information the situation of children affected by armed conflict, bearing in mind existi mandates and reports of relevant bodies;

(*c*) To continue its consideration of this question at its fifty-four session under the item entitled "Promotion and protection of the rights the child".

## 18. Human rights and unilateral coercive measures*

*The General Assembly,*

*Recalling* its resolutions 51/103 of 12 December 1996 and 52/120 12 December 1997, and noting Commission on Human Rights resolutic 1998/11 of 9 April 1998,[1]

*Reaffirming* the pertinent principles and provisions contained in th Charter of Economic Rights and Duties of States proclaimed by the Gener Assembly in its resolution 3281 (XXIX) of 12 December 1974, in particul article 32 thereof, in which it declared that no State may use or encourag the use of economic, political or any other type of measures to coerc another State in order to obtain from it the subordination of the exercise its sovereign rights,

*Taking note* of the report submitted by the Secretary-General pursuant to Commission on Human Rights resolution 1995/45 of 3 Marc

* Resolution 53/142 adopted on 9 December1998 with a vote 110-45-10.

1. See *Official Records of the Economic and Social Council, 1998, Supplement NO.* (E/1998/23), chap. II, sect. A.

2. E/CN.4/1996/45 and Add.1.

995,[1] and the report of the Secretary-General on the implementation of ssembly resolution 52/120,[2]

*Recognizing* the universal, indivisible, interdependent and interrelated aracter of all human rights and, in this regard, reaffirming the right to evelopment as an integral part of all human rights,

*Recalling* that the World Conference on Human Rights called upon ates to refrain from any unilateral coercive measure not in accordance ith international law and the Charter of the United Nations that creates ostacles to trade relations among States and impedes the full relaization f all human rights,[3]

*Bearing in mind* all the references to this question in the Copenhagen eclaration on Social Development, adopted by the World Summit for ocial Development on 12 March 1995,[4] the Beijing Declaration and latform for Action, adopted by the Fourth World Conference on Women n 15 September 1995,[5] and the Istanbul Declaration on Human Settlements nd the Habitate agenda adopted on 14 June 1996 by the United Nations onference for Human Settlements (Habitat II),[6]

*Deeply concerned* that, despite the recommendations adopted on this ssue by the General Assembly and recent major United Nations conferences nd contrary to general international law and the Charter of the United Nations, unilateral coercive measures continue to be promulgated and mplemented with all their extraterritorial effects, *inter alia*, on the economic nd social development of targeted countries and peoples and individuals nder the jurisdiction of other States,

*Noting* the continuing efforts of the Working Group on the Right to Development, and reaffirming in particular its criteria according to which nilateral coercive measures are one of the obstacles to the implementation f the Declaration on the Right to Development,[7]

1. *Urges* all States to refrain from adopting or implementing any nilateral measures not in accordance with international law and the Charter f the United Nations, in particular those of a coercive nature with all their

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See *Official Records of the Economic and Social Council, 1995, Supplement No. 3* and corrigenda (E/1995/23 and Corrs.1 and 2), chap. II, sect. A.

A/53/293 and add.1.

See A/CONF. 157/24 (Part I), chap. II, sect. I, para. 31.

*Report of the World Summit for Social Development, Copenhagen, 6-12 March 1995* (United Nations publication, Sales No. E.96. IV. 8), chap. I, resolution 1, annex I.

*Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995* (United Nations publication, Sales No. E. 96. IV. 13), chap. I, resolution 1, annexes I and II.

A/CONF. 165/14, chap. I, resolution 1, annexes I and II.

Resolution 41/128, annex

extraterritorial effects, which create obstacles to trade relations am
States, thus impeding the full realization of the rights set forth in the Unive
Declaration of Human Rights[1] and other international human ri
instruments, in particular the right of individuals and peoples
development;

2. *Rejects* unilateral coercive measures with all their extraterrito
effects as tools for political or economic pressure against any country
particular against developing countries, because of their negative effe
on the realization of all the human rights of vast sectors of their populatio
in particular children, women and the elderly;

3. Calls upon Member States that have initiated such measures to com
themselves to their obligations and responsibilities arising from t
international human rights instruments to which they are party by revoki
such measures at the earliest time possible;

4. *Reaffirms,* in this context, the right of all peoples to self-determinatio
by virtue of which they freely determine their political status and free
pursue their economic, social and cultural development;

5. *Urges* the Commission on Human Rights to take fully into accou
the negative impact of unilateral coercive measures, including enactme
of national laws and their extraterritorial application, in its task concerni
the implementation of the right of development;

6. *Requests* the United Nations High Commissioner for Human Righ
in discharging her functions relating to the promotion, realization a
protection of the right to development, to give urgent consideration to t
present resolution in her annual report to the General Assembly;

7. *Requests* the Secretary-Genral to bring the present resolution to t
attention of all Member States, to seek their views and information on t
implication and negative effects of unilateral coercive measures on the
populations and to submit accordingly a report thereon to the Gener
Assembly at its fifty-fourth session;

8. *Decides* to examine this question on a priority basis at its fifty-four
session under the sub-item entitled "Human rights questions, includi
alternative approaches for improving the effective enjoyment of hum
rights and fundamental freedoms".

*In favour:* Afghanistan, Algeria, Angola, Antigua and Barbuda, Argentin
Bahamas, Bahrain, Bangldesh, Barbados, Belarus, Belize, Benin, Bhuta
Bolivia, Botswana, Brazil, Brunei Darussalam, Cameroon, Cape Verd
Central African Republic, Chad, Chile, China, Colombia, Comoros, Cos

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1. Resolution 217 A (III).

ca, Cote d'Ivoire, Cuba, Democratic People's Republic of Korea, mocratic Republic of the Congo, Djibouti, Ecuador, Egypt, El Salvador, uatorial Guinea, Eritrea, Ethiopia, Fiji, Gambia, Georgia, Ghana, Grenada, atemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, India, donesia, Iran, Jamaica, Jordan, Kenya, Lao People's Democratic public, Lebanon, Lesotho, Libya, Madagascar, Malawi, Malaysia, Mali, auritania, Mauritius, Mexico, Mongolia, Morocco, Mozambique, yanmar, Namibia, Nepal, Niger, Nigeria, Oman, Pakistan, Panama, Papua w Guinea, Paraguay, Peru, Philippines, Qatar, Russian Federation, Saint tts and Nevis, Saint Lucia, Samoa, Saudi Arabia, Senegal, Seychelles, erra Leone, Singapore, Solomon Islands, South Africa, Sri Lanka, Sudan, riname, Swaziland, Syria, Thailand, Togo, Trinidad and Tobago, Tunisia, ited Arab Emirates, United Republic of Tanzania, Uruguay, Vanuatu, enezuela, Vietnam, Yemen, Zambia, Zimbabwe.

*ainst:* Albania, Andorra, Australia, Austria, Belgium, Bulgaria, Canada, oatia, Czech Republic, Denmark, Estonia, Federated States of Micronesia, nland, France, Gabon*, Germany, Greece, Hungary, Iceland, Irelnd, ael, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Monaco, ethrlands, New Zealand, Norway, Poland, Portugal, Republic of Korea, epublic of Moldova, Romania, San Marino, Slovakia, slovenia, Spain, veden, The former Yugoslav Republic of Macedonia, Turkey, United ngdom, United States.

*ostain*: Armenia, Cyprus, Kazakhstan, Kyrgyzstan, Malta, Marshall lands, Nicaragua, Tajikistan, Ukraine, Uzbekistan.

*osent*: Azerbaijan, Burkina Faso, Burundi, Dominica, Dominican epublic, Kuwait, Maldives, Palau, Rwanda, Saint Vincent and the rnadines, Turkmenistan, Uganda.

* Later advised the Secretariat that it had intended to abstain.

## 19. Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*

*ne General Assembly,*

*Reaffirming* the importance of the observance of the purpose and

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Resolution 53/144 adopted on 9 December1998 without a vote.

principles of the Charter of the United Nations for the promotion protection of all human rights and fundamental freedoms for all person all countries in the world,

*Recalling* Commission on Human Rights resolution 1998/7 of 3 A 1998,[1] in which the Commission approved the text of the draft declara on the right and responsibility of individuals, groups and organs of soc to promote and protect universally recognized human rights fundamental freedoms,

*Recalling* also Economic and Social Council resolution 1998/33 of July 1998, in which the Council recommended the draft declaration to General Assembly for adoption,

*Conscious* of the importance of the adoption of the draft declaration the context of the fiftieth anniversary of the Universal Declaration of Hum Rights,[2]

1. *Adopts* the Declaration on the Right and Responsibility of Individua Groups and Organs of Society to Promote and Protect Universal Recognized Human Rights and Fundamental Freedoms, annexed to t present resolution;

2. *Invites* Governments, agencies and organizations of the Unit Nations system and intergovernmental and non-government organizations to intensify their efforts to disseminate the Declaration a to promote universal respect and understanding thereof, and request t Secretary-General to include the text of the Declaration in the next editi of Human Rights: A Compilation of International Instruments.

## ANNEX

## Declaration on the Right and Responsibility of Individuals, Group and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms

*The General Assembly,*

*Reaffirming* the importance of the observance of the purposes a principles of the Charter of the United Nations for the promotion a protection of all human rights and fundamental freedoms for all persons all countries of the world,

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1. See *Official Records of the Economic and social council, 1998, Supplement No (E/1998/23), chap. II, sect. A.*
2. Resolution 217 A (III).

*Reaffirming also* the importance of the Universal Declaration of Human ghts and the International Covenants on Human Rights as basic elements international efforts to promote universal respect for and observance of man rights and fundamental freedoms and the importance of other human ghts instruments adopted within the United Nations system, as well as ose at the regional level,

*Stressing* that all members of the international community shall fulfil, intly and separately, their solemn obligation to promote and encourage spect for human rights and fundamental freedoms for all without stinction of any kind, including distinctions based on race, colour, sex, nguage, religion, political or other opinion, national or social origin, operty, birth or other status, and reaffirming the particular importance of hieving international cooperation to fulfil this obligation according to e Charter of the United Nations,

*Acknowledging* the important role of international cooperation for and e valuable work of individuals, groups, and associations in contributing the effective elimination of all violations of human rights and fundamental eedoms of peoples and individuals, individuals, including in relation to ass, flagrant or systematic violations such as those resulting from partheid, all forms of recial discrimination, colonialism, foreign omination or occupation, aggression or threats to national sovereignty, ational unity or territorial integrity, and from the refusal to recognize the ght of peoples to self-determination and the right of every people to xercise full sovereignty over its wealth and natural resources,

*Recognizing* the relationship between international peace and security nd the enjoyment of human rights and fundamental freedoms, and mindful nd the absence of international peace and security does not excuse non-ompliance,

*Reiterating* that all human rights and fundamental freedoms are niversal, indivisible and interdependent and interrelated, and should be romoted and implemented in a fair and equitable manner, without prejudice the implementation of each of those rights and freedoms,

*Stressing* that the primary responsibility and duty to promote and protect uman rights and fundamental freedoms lie with the State,

*Recognizing* the right and the responsibility of individuals, groups and ssociations to promote respect for, and foster knowledge of, human rights nd fundamental freedoms at the national and international levels ,

*eclares;*

## Article 1

Everyone has the right, individually and in association with others promote and to strive for the protection and realization of human rights fundamental freedoms at the national and international levels.

## Article 2

1. Each State has a prime responsibility and duty to protect, prom and implement all human rights and fundamental freedoms, *inter alia*, adopting such steps as may be necessary to create all conditions necess in the social, economic and political as well as other fields and the le guarantees required to ensure that all persons under its jurisdicti individually and in association with others, are able to enjoy all those rig and freedoms in practice.

2. Each State shall adopt such legislative, administrative and ot steps as may be necessary to ensure that the rights and freedoms refer to in the present Declaration are effectively guaranteed.

## Article 3

Domestic law consistent with the Charter of the United Nations a other international obligations of the State in the field of human rights a fundamental freedoms is the juridical framework within which hum rights and fundamental freedoms should be implemented and enjoyed, a within which all activities referred to in the present Declaration for t promotion, protection and effective realization of those rights and freedo should be conducted.

## Article 4

Nothing in the present Declaration shall be construed as impairing contradicting the purposes and principles of the Charter of the Unit Nations or as restricting or derogating from the provisions of the Univers Declaration of Human Rights,[1] the International Covenants on Hum Rights[2] and other international instruments and commitments applicable this field.

## Article 5

For the purpose of promoting and protecting human rights a fundamental freedoms, everyone has the right, individually and association with others, at the national and international levels;

1. Resolution 217 A (III).
2. See resolution 2200 A (XXI), annex.

(*a*) To meet or assemble peacefully;

(*b*) To form, join and participate in non-governmental organizations, ociations or groups;

(*c*) to communicate with non-governmental or intergovernmental anizations.

**Article 6**

Everyone has the right, individually and in association with others:

(*a*) To know, seek, obtain, receive and hold information about all man rights and fundamental freedoms, including having access to ormation as to how those rights and freedoms are given effect in domestic islative, judicial or administrative systems;

(*b*) As provided in human rights and other applicable international truments, freely to publish, impart or disseminate to others views, ormation and knowledge of all human rights and fundamental freedoms;

(*c*) To study, discuss, form and hold opinions on the observance, both law and in practice, of all human rights and fundamental freedoms and, rough these and other appropriate means, to draw public attention to ose matters.

**Article 7**

Everyone has the right, individually and in association with others, to velop and discuss new human rights ideas and principles, and to advocate eir acceptance.

**Article 8**

1. Everyone has the right, individually and in association with others, have effective access, on a non-discriminatory basis, to participation in government of his or her country and in the counduct of public affairs.

2. This includes, *inter alia*, the right, individually and in association th others, to submit to governmental bodies and agencies and ganizations concerned with public affairs, criticism and proposals for proving their functioning and to draw attention to any aspect of their rk that may hinder or impede the promotion, protection and realization human rights and fundamental freedoms.

**Article 9**

1. In the exercise of human rights and fundamental freedoms, including promotion and protection of human rights as referred to in the present

Declaration, everyone has the right, indiv̌idually and in association others, to benefit from an effective remedy and to be protected in the e of the violation of those rights.

2. To this end, everyone whose rights or freedoms are allegedly viol has the right, either in person or through legally authorized representat to complain to and have that complaint promptly reviewed in a pu hearing before an independent, impartial and competent judicial or o authority established by law, and to obtain form such an authority a decis in accordance with law, providing redress, including any compensat due, where there has been a violation of that person's rights or freedo as well as enforcement of the eventual decision and award, all with undue delay.

3. To the same end, everyone has the right, individually and association with others, *inter alia*:

(*a*) To complain about the policies and actions of individual offici and governmental bodies with regard to violations of human rights a fundamental freedoms by petition or other appropriate means to compet domestic judicial, administrative or legislative authorities or any ot competent authority provided for by the legal system of the State, wh should render their decision on the complaint without undue delay;

(*b*) To attend public hearings, proceedings and trials, so as to form opinion on their compliance with national law and applicable internatio obligations and commitments;

(*c*) To offer and provide professionally qualified legal assistance other relevant advice and assistance in defending human rights a fundamental freedoms:

4. To the same end, and in accordance with applicable internatio instruments and procedures, everyone has the rights, individually and association with others, to unhindered access to and communication w international bodies with general or special competence to receive a consider communications on matters of human rights and fundamen freedoms.

5. The State shall conduct a prompt and impartial investigation ensure that an inquiry takes place whenever there is reasonable ground believe that a violation of human rights and fundamental freedoms h occurred in any territory under its jurisdiction.

### Article 10

No one shall participate, by act or failure to act where required, violating human rights and fundamental freedoms, and no one shall

jected to punishment or adverse action of any kind for refusing to do

### Article 11

Everyone has the right, individually and in association with others, to lawful exercise of his or her occupation or profession. Everyone who, a result of his or her profession, can affect the human dignity, human nts and fundamental freedoms of others should respect those rights and edoms and comply with relevant national and international standards of upational and professional conduct or ethics.

### Article 12

1. Everyone has the right, individually and in association with others, participate in peaceful activities against violations of human rights and damental freedoms.

2. The State shall take all necessary measures to ensure the protection the competent authorities of everyone, individually and in association h others, against any violence, threats, retaliation, *de facto* or *de jure* verse discrimination, pressure or any other arbitrary action as a nsequence of his or her legitimate exercise of the rights referred to in the sent Declaration.

3. In this connection, everyone is entitled, individually and in association h others, to be effectively protected under national law in reacting inst or opposing, through peaceful means, activities and acts, including se by omission, attributable to States that result in violations of human nts and fundamental freedoms, as well as acts of violence perpetrated by ups or individuals that affect the enjoyment of human rights and damental freedoms.

### Article 13

Everyone has the right, individually and in association with others, to icit, receive and utilize resources for the express purpose of promoting l protecting human rights and fundamental freedoms, through peaceful ans, in accordance with article 3 of the present Declaration.

### Article 14

1. The State has the responsibility to take legislative, judicial, ninistrative or other appropriate measures to promote the understanding all persons under its jurisdiction of their civil, political, economic, social l cultural rights.

2. Such measures shall include, *inter alia*:

(*a*) The publication and widespread availability of national laws regulations and of applicable basic international human rights instrum

(*b*) Full and equal access to international documents in the fiel human rights, including the State's periodic reports to the bodies establi by the international human rights treaties to which it is a party, as we the summary records of discussions and the official reports of these bo

3. The State shall ensure and support, where appropriate, the crea and development of further independent national institutions for promotion and protection of human rights and fundamental freedoms i territory under its jurisdiction, whether they be ombudsmen, human ri commissions or any other form of national institution.

**Article 15**

The State has the responsibility to promote and facilitate the teac of human rights and fundamental freedoms at all levels of education, to ensure that all those responsible for training lawyers, law enforcem officers, the personnel of the armed and public officials include appropr elements of human rights teaching in their training programme.

**Article 16**

Individuals, non-governmental organizations and relevant instituti have an important role to play in contributing to making the public m aware of questions relating to all human rights and fundamental freed through activities such as education, training and research in these a to strengthen further, *inter alia*, understanding, tolerance, peace and frie relations among nations and among all racial and religious groups, bea in mind the various backgrounds of the societies and communities in w they carry out their activities.

**Article 17**

In the exercise of the rights and freedoms referred to in the pre Declaration, everyone, acting individually and in association with oth shall be subject only to such limitations as are in accordance with applic international obligations and are determined by law solely for the purp of securing due recognition and respect for the rights and freedom others and of meeting the just requirements of morality, public order the general welfare in a democratic society.

### Article 18

1. Everyone has duties towards and within the community in which ne the free and full development of his or her personality is possible.

2. Individuals, groups, institutions and non-governmental organizations e an important role to play and a responsibility in safeguarding nocracy, promoting human rights and fundamental freedoms and ntributing to the promotion and advancement of democratic societies, titutions and processes.

3. Likewise, they have an important role and a responsibility in ntributing, as appropriate, to the promotion of the right of everyone to ocial and international order in which the rights and freedoms set forth the Universal Declaration of Human Rights and other human rights truments can be fully realized.

### Article 19

Nothing in the present Declaration shall be interpreted as implying for y individual, group or organ of society or any State the right to engage any activity to perform any act aimed at the destruction of the rights and eedoms referred to in the present Declaration.

### Article 20

Nothing in the present Declaration shall be interpreted as permitting ates to support and promote activities of individuals, groups of individuals, stitutions or non-governmental orgnizations contrary to the provisions the Charter of the United Nations.

## 20. Extrajudicial, summary or arbitrary executions*

*e General Assembly,*

*Recalling* the Universal Declaration of Human Rights,[1] which arantees the right to life, liberty and security of person, and the relevant ovisions of the International Covenant on Civil and Political Rights,[2]

*Recalling* also its resolutions 47/136 of 18 December 1992 and 51/92 12 December 1996, as well as Commission on Human Rights resolutions 92/72 of 5 March 1992[3] and 1998/68 of 21 April 1998,[4]

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Resolution 53/147 adopted on 9 December1998 without a vote.

Resolution 217 A (III).

See resolution 2200 A (XXI), annex.

See *Official Records of the Economic and Social Council, 1992, Supplement No.2* (E/1992/22), chap. II, sect. A.

*Ibid*, 1998, Supplement No.3 (E/1998/23), chap. II, sect. A.

*Recalling* further Economic and Social Council resolution 1984/50 25 May 1984 and the safeguards guaranteeing protection of the rights those facing the death penalty annexed thereto and Council resolut 1989/64 of 24 May 1989 on their implementation, as well as the Declarat of Basic Principles of Justice for Victims of Crime and Abuse of Pow adopted by the General Assembly in its resolution 40/34 of 29 Novem 1985,

*Deeply alarmed* at the persistence, on a large scale, of extrajudici summary or arbitrary executions in all parts of the world,

*Dismayed* that in a number of countries impunity, the negation justice, continues to prevail and often remains the main cause of t continuing occurrence of extrajudicial, summary or arbitrary executions those countries,

*Recalling*, in this fiftieth anniversary of the Convention on t Prevention and Punishment of the Crime of Genocide,[1] article 6 of t Convention, and acknowledging in this context the historic significance the adoption of the Rome Statute of the International Criminal Court,[2]

*Acknowledging* the contribution of the United Nations Diplomat Conference of Plenipotentiaries on the Establishment of an Internation Criminal Court with regard to ensuring effective prosecution concernir executions in serious violation of article 3 common to the four Genev Conventions of 12 August 1949,[3] without prvious judgment pronounce by a regularly constituted court affording all judicial guarantees that a generally recognized as indispensable,

*Convinced* of the need for effective action to combat and to elimina the abhorrent practice of extrajudicial, summary or arbitrary execution which represent a flagrant violation of the fundamental right to life,

1. *Strongly condemns* once again all the extrajudicial, summary arbitrary executions that continue to take place throughout the world;

2. *Demands* that all Governments ensure that the practice extrajudicial, summary or arbitrary executions be brought to an end ar that they take effective action to combat and eliminate the phenomenon all its forms;

3. *Reiterates* the obligation of all Governments to conduct exhausti and impartial investigations into all suspected cases of extrajudicia arbitrary or summary executions, to identify and bring to justice thos responsible, to grant adequate compensation to the victims or their famili

1. Resolution 260 A (III).
2. A/CONF. 183/9.
3. United Nations, *Treaty Series*, vol. 75, Nos. 970-973.

to adopt all necessary measures to prevent the recurrence of such cutions;

4. *Notes* the encouragement given to the Special Rapporteure of the mmission on Human Rights to continue, within the framework of her ndate, to collect information from all concerned and to seek the views comments of Governments so as to be able to respond effectively to able information that comes before her and to follow up communications country visits;

5. *Reaffirms* Economic and Social Council decision 1998/265 of 30 y 1998, in which the Council endorsed the decision of the Commission Human Rights, in its resolution 1998/68, to extend the mandate of the ecial Rapporteur on extrajudicial, summary or arbitrary executions for ee years;

6. *Takes* note of the statement made by the Special Rapporteur on rajudicial, summary or arbitrary executions before the General Assembly 4 November 1998;[1]

7. *Notes* the important role the Special Rapporteur has played towards elimination of extrajudicial, arbitrary or summary executions;

8. *Recalls* that the Commission on Human Rights, in its resolution 98/68, requested the Special Rapporteur, in carrying our her mandate:

(*a*) To continue to examine situations of extrajudicial, summary or itrary executions and to submit her findings on an annual basis, together th conclusions and recommendations, to the Commission on Human ghts, as well as such other reports as the Special Reapprteur deems cessary to keep the Commission informed about serious situations of rajudicial, summary or arbitrary executions that warrant its immediate ention;

(*b*) To respond effectively to information that comes before her, in ticular when an extrajudicial, summary or arbitrary execution is imminent threatened or when such as execution has occurred;

(*c*) To enhance further her dialogue with Governments, as well as to low up recommendations made in reports after visits to particular intries;

(*d*) To continue to pay special attention to extrajudicial, summary or itrary executions of children and women and to allegations concerning lations of the right to life in the context of violence against participants demonstrations and other peaceful public manifestations or against sons belonging to minorities;

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See A/C.3/53/SR.34.

(*e*) To pay special attention to extrajudicial, summary or arbitr executions where the victims are individuals carrying out peaceful activit in the defence of human rights and fundamental freedoms;

(*f*) To continue monitoring the implementation of existing internatio standards on safeguards and restrictions relating to the imposition of capi punishment, bearing in mind the comments made by the Human Rig Committee in its interpretation of article 6 of the International Covenant Civil and Political Rights,[1] as well as the Second Optional Protocol theret

(*g*) To apply a gender perspective in her work;

9. *Strongly urges* all Governments to respond to the communicatio transmitted to them by the Special Rapporteur, and urges them and a others concerned to cooperate with and assist the Special Rapporteur s that she may carry out her mandate effectively, including, where appropriat by issuing invitations to the Special Rapporteur when she so requests;

10. *Encourages* Governments, international organizations and no govermental organizations to organize training programmes and to suppo project with a view to training or educating military forces, law enforceme officers and government officials, as well as members of United Nation peacekeeping or observer missions, in human rights and humanitarian la issues connected with their work, and appeals to the international communit to support endeavours to that end;

11. *Urges* the Special Rapporteur to continue to draw to the attentio of the United Nations High Commissioner for Human Rights such situation of extrajudicial, summary or arbitrary executions as are of articular seriou concern to her or where early action might prevent further deterioration

12. *Welcomes* the cooperation established between the Specia Rapporteur and other United Nations mechanisms and procedures relatin to human rights, as well as with medical and forensic, experts, an encourages the Special Rapporteur to continue efforts in this regard;

13. *Calls upon* the Governments of all States in which the death penalt has not been abolished to comply with their obligations under relevan provisions of international human rights instruments, keeping in mind th safeguards and guarantees referred to in Economic and Social Counc resolutions 1984/50 of 25 May 1984 and 1989/64 of 24 May 1989;

14. *Again requests* the Secretary-General to continue to use his be endeavours in cases where the minimum standard of legal safeguard provided for in articles 6,9, 14 and 15 of the International Covenant o

1. Resolution 260 A (III).
2. Resolution 44/128, annex.

vil and Political Rights appears not to have been respected;

15. *Requests* the Secretary-General to provide the Special Rapporteur th an adequate and stable level of human, financial and material resources, enable her to carry out her mandate effectively, including through country sits;

16. *Also requests* the Secretry-General to continue, in close llaboration with the United Nations High Commissioner for Human ghts, in conformity with the High Commissioners' mandate established the General Assembly in its resolution 48/141 of 20 December 1993, ensure that personnel specialized in human rights and humanitarian law sues form part of United Nations missions, where appropriate, in order to al with serious violations of human rights, such as extrajudicial, summary arbitrary executions;

17. *Requests* the Special Rapporteur to submit an interim report to the eneral Assembly at its fifty-fifth session on the situation world wide in gard to extrajudicial, summary or arbitrary executions and her commendations for more effective action to combat that phenomenon.

## 21. Status of the Protocols Additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflicts*

*he General Assembly,*

*Recalling* its resolutions 32/44 of 8 December 1977, 34/51 of 23 ovember 1979, 37/116 of 16 December 1982, 39/77 of 13 December 984, 41/72 of 3 December 1986, 43/161 of 9 December 1988, 45/38 of 8 November 1990, 47/30 of 25 November 1992, 49/48 of 9 December 994 and 51/155 of 16 December 1996,

*Having considered* the report of the Secretary-General[1] on the status of e Protocols[2] Additional to the Geneva Conventions of 1949[3] and relating the protection of victims of armed conflicts,

*Convinced* of the continuing value of established humanitarian rules lating to armed conflicts and the need to respect and ensure respect for ese rules in all circumstances within the scope of the relevant international struments, pending the earliest possible termination of such conflicts,

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Resolution 53/96 adopted on 8 December1998 without a vote.

A/53/287.

United Nations, *Treaty Series*, vol. 1125, Nos. 1712 and 17513.

*Ibid.*, vol. 75, Nos. 970-973.

*Stressing* the possibility of making use of the International Fact-Findi Commission in relation to an armed conflict, pursuant to article 90 Protocol I, and recalling that the International Fact-Finding Commissi may, where necessary, facilitate, through its good offices, the restorati of an attitude of respect for the Conventions and the Protocol,

*Stressing also* the need for consolidating the existing body international humanitarian law through its universal acceptance and t need for wide dissemination and full implementation of such law at t national level,

*Mindful* of the role of the International Committee of the Red Cross offering protection to the victims of armed conflicts,

*Noting with appreciation* the continuing efforts of the Internationa Committee of the Red Cross to promote and disseminate knowledge o international humanitarian law, in particular the Geneva Conventions an the two additional Protocols, Noting that the Twenty-sixth Internationa Conference of the Red Cross and Red Crescent endorsed th recommendation of the Intergovernmental Group of Experts on th Protection of War Victims, including that the depositary of the Genev Conventions of 1949 should organize periodic meetings of States partie to the Conventions to consider general problems regarding the applicatio of international humanitarian law,

*Acknowledging* the fact that the Rome Statute of the Internationa Criminal Court, adopted on 17 July 1998,[1] includes the most serious crime of international concern under international humanitarian law, and that th Statute, while recalling that it is the duty of every State to exercise it criminal jurisdiction over those responsible for such crimes, shows th determination of the international community to put an end to impunity fo the perpetrators of such crimes and thus to contribute to their prevention

*Noting* the analytical report of the Secretary-General on minimum humanitarian standards[2] submitted to the Commission on Human Rights a its fifty-fourth session,

*Noting also* that international humanitarian law has been an importan topic during the United Nations Decade of International Law, which wil come to a close in 1999, fifty years after the adoption of the Genev Conventions, and that the importance of this body of law will be highlighte in the context of the celebration in 1999 at The Hague and in St. Petersbur of the centennial of the first International Peace Conference,

1. A/CONF. 183/9.
2. E/CN.4/1998/87 and Add.1.

1. *Appreciates* the virtually universal acceptance of the Geneva onventions of 1949,[1] and notes the trend towards a similarly wide ceptance of the two additional Protocols of 1977;[2]

2. *Appeals* to all States parties to the Geneva Conventions of 1949 that ve not yet done so to consider becoming parties to the additional Protocols the earliest possible date;

3. *Calls upon* all States that are already parties to Protocol I, or those ates not parties, on becoming parties to Protocol I, to make the declaration ovided for under article 90 of that Protocol;

4. *Calls upon* all States parties to the additional Protocols to ensure their ide dissemination and full implementation;

5. *Affirms* the necessity of making the implementation of international manitarian law more effective;

6. *Welcomes* the activities of the Advisory Service of the International ommittee of the Red Cross in supporting efforts undertaken by Member ates to take legislative and administrative action to implement ternational humanitarian law and in promoting the exchange of formation on those efforts between Governments;

7. *Welcomes also* the holding in January 1998 of the first periodic eeting on the application of international humanitarian law;

8. *Notes* the holding in October 1998 of the Meeting of experts on eneral Problems of the Implementation of the Fourth Geneva Convention;

9. *Requests* the Secretary-General to submit to the General Assembly its fifty-fifth session a report on the status of the additional Protocols, as ell as measures taken to strengthen the existing body of international manitarian law, *inter alia*, with respect to its dissemination and full plementation at the national level, based on information received from ember States and the International Committee of the Red Cross;

10. *Decides* to include in the provisional agenda of its fifty-fifty session e item entitled "Status of the Protocols Additional to the Geneva onventions of 1949 and relating to the protection of victims of armed nflicts".

## 22. Principles and Guidelines for International Negotiations*

*he General Assembly,*

*Recalling* the purposes and principles of the Charter of the United ations,

Resolution 53/101 adopted on 8 December1998 without a vote.

United Nations, *Treaty Series*, vol. 75, Nos. 970-973.

*Ibid.*, vol. 1125, Nos. 17512 and 17513.

*Reaffirming* the provisions of the Declaration on Principles International Law concerning Friendly Relations and Cooperation amo States in accordance with the Charter of the United Nations[1] and of t Manila Declaration on the Peaceful Settlement of International Dispute

*Taking into account* the objectives of the United Nations Decade International Law,

*Considering* that international negotiations constitute a flexible a effective means for, among other things, the peaceful settlement of disput among States and for the creation of new international norms of condu

*Bearing in mind* that in their negotiations States should be guided the relevant principles and rules of international law,

*Conscious* of the existence of different means of peaceful settlement disputes, as enshrined in the Charter of the United Nations and recogniz by international law, and reaffirming in this context the right of free choi of those means,

*Bearing in mind also* the important role that constructive and effecti negotiations can play in attaining the purposes of the Charter of the Unite Nations by contributing to the management of international relations, th peaceful settlement of disputes and the creation of new international norm of conduct of States,

*Noting* that the identification of principles and guidelines of relevanc to international negotiations could contribute to enhancing the predictabilit of negotiating parties, reducing uncertainty and promoting an atmospher of trust at negotiations,

*Recognizing* that the following could offer a general, non-exhausti frame of reference for negotiations,

1. *Reaffirms* the following principles of international law which are relevance to international negotiations:

(*a*) Sovereign equality of all States, notwithstanding differences of a economic, social, political or other nature;

(*b*) States have the duty not to intervene in matters within the domest jurisdiction of any State, in accordance with the Charter of the Unite Nations:

(*c*) States have the duty to fulfil in good faith their obligations und international law;

1. Resolution 2625 (XXV), annex.
2. Resolution 37/10, annex.

(*d*) States have the duty to refrain in their international relations from e threat or use of force against the territorial integrity or political dependence of any State, or in any other manner inconsistent with the rposes of the United Nations;

(*e*) Any agreement is void if its conclusion has been procured by threat use of force in violation of the principles of international law embodied the Charter of the United Nations;

(*f*) States have the duty to cooperate with one another, irrespective of e differences in their political, economic and social systems, in the various heres of international relations, in order to maintain international peace d security and to promote international economic stability and progress, e general welfare of nations and international cooperation free from scrimination based on such differences;

(*g*) States shall settle their international disputes by peaceful means in ich a manner that international peace and security, and justice, are not ndangered;

(2) *Affirms* the importance of conducting negotiations in accordance vith international law in a manner compatible with and conducive to the chievement of the stated objective of negotiations and in line with the ollowing guidelines:

(*a*) Negotiations should be conducted in good faith;

(*b*) States should take due account of the importance of engaging, in an ppropriate manner, in international negotiations the States whose vital nterests are directly affected by the matters in question;

(*c*) The purpose and object of all negotiations must be fully compatible vith the principles and norms of international law, including the provisions f the Charter of the United Nations;

(*d*) States should adhere to the mutually agreed framework for onducting negotiations;

(*e*) States should endeavour to maintain a constructive atmosphere uring negotiations, and to refrain from any conduct which might undremine ne negotiations and their progress;

(*f*) States should facilitate the pursuit or conclusion of negotiations by emaining focused throughout on the main objectives of such negotiations;

(*g*) States should use their best endeavours to continue to work towards mutually acceptable and just solution in the event of an impasse in egotiations.

## 23. Third-party liability of the UN: temporal and financial limitations*

*The General Assembly,*

*Recalling* its resolution 51/13 of 4 November 1996 on third-par liability against the United Nations resulting or arising from peacekeepi operations conducted by the Organization, in which the Assembly requeste the Secretry-General to develop specific measures, including criteria an guidelines for implementing the principles of temporal and financia limitations on the liability of the United Nations,

*Having considered* the report of the Secretary-General on third-part liability[1] and the related report of the Advisory Committee on Administrativ and Budgetary Questions,[2]

1. *Takes note* of the report of the Secretary-General on third-part liability;[3]

2. *Also takes note* of the observations contained in the report of th Advisory Committee on Administrative and Budgetary Questions;[4]

3. *Endorses* the proposals of the Secretary-General[5] for implementin the principles of temporal and financial limitations on the liability of the Organization;

4. *Also endorses* the recommendations of the Advisory Committee o Administrative and Budgetary Questions;[6]

5. *Decides* that the temporal and financial limitations set out i paragraphs 8 to 11 below shall apply to third-party claims against the Organization for personal injury, illness or death, and for property loss o damage (including non-consensual use of premises) resulting from o attributable to the activities of members of peacekeeping operations in the performance of their official duties deceived in paragraph 13 of the repor of the Secretary-General;[7]

6. *Endorses* the view of the Secretary-General that liability is no engaged in relation to third-party claims resulting from or attributable t the activities of members of peacekeeping operations arising from

* Resolution 53/247 adopted on 26 June 1998 without a vote.

1. A/51/903.
2. A/52/410.
3. A/51/903.
4. A/52/410.
5. See, in particular, A/51/903, sect. IV.
6. A/52/410, para. 5.
7. A/51/903.

erational necessity", as described in paragraph 14 of he first report of Secretary-General on third-party liability;[1]

7. *Also endorses* the views of the Secretary-General, reflected in agraph 14 of his report,[2] with regard to third-party claims resulting from ss negligence or wilful misconduct of the personnel provided by troop-tributing States for peacekeeping operations, and requests him to report their implementation in the relevant performance reports;

8. *Decides* that, where the liability of the Organization is engaged in ation to third-party claims against the Orgnization resulting from cekeeping operations, the Orgnaization will not pay compensation in ard to such claims submitted after six months from the time the damage, ury or loss was sustained, or from the time it was discovered by the imant, and in any event after one year from the termination of the ndate of the peacekeeping operation, provided that in exceptional cumstances, such as described in paragraph 20 of the Secretry-General,[3] Secretary-General may accept for consideration a claim made at a later e;

9. *Decides* also, in respect of third-party claims against the Organization personal injury, illness or death resulting from peacekeeping operations, t:

(*a*) Compensable types of injury or loss shall be limited to economic s, such as medical and rehabilitation expenses, loss of earnings, loss of ancial support, transportation expenses associated with the injury, illness medical care, legal and burial expenses:

(*b*) No compensation shall be payable by the United Nations for non-omomic loss, such as pain and suffering or moral anguish, as well as itive or moral damages;

(*c*) No compensation shall be payable by the United Nations for nemaker services and other such damages that, in the sole opinion of Secretary-General, are impossible to verify or are not directly related the injury or loss itself;

(*d*) The amount of compensation payable for injury, illness or death any individual, including for the types of loss and expenses described subparagraph (*a*) above, shall not exceed a maximum of 50,000 ited States dollars, provided, however, that within such limitation actual amount is to be determined by reference to local compensation ndards;

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A/51/389.
A51/903.
A/51/903.

(*e*) In exceptional circumstances, the Secretary-General may recomme to the General Assembly, for its approval, that the limitation of 50,0 dollars provided for in subparagraph (*d*) above be exceed in a particu case if the Secretary-General, after carrying out the required investigati finds that there are compelling reasons for exceeding the limitation;

10. *Decides* further in respect of third-party claims against t Organization for property loss or damage resulting from peacekeepi operations that:

(*a*) Compensation for non-consensual use of premises shall either: be calculated on the basis of the fair rental value, determined on the ba of the local rental market prices that prevailed prior to the deployment the peacekeeping operation as established by the United Nations pre-missi technical survey team; or (*ii*) not exceed a maximum ceiling amount payab per square meter or per hectare as established by the United Nations pr mission technical survey team on the basis of available relevant informatio the Secretry-General will decide on the appropriate method for calculati compensation payable for non-consensual use of premises at the conclusi of the pre-mission technical survey;

(*b*) Compensation for loss or damage to premises shall either: (*i*) calculated on the basis of the equivalent of a number of months of t rental value, or a fixed percentage of the rental amount payable for t period of United Nations occupancy; or (*ii*) be set at a fixed percentage the cost of repair; the Secretary-General will decide on the appropria method for calculating compensation payable for loss or damage to premis at the conclusion of the pre-mission technical survey;

(*c*) No compensation shall be payable by the United Nations for loss damages that, in the sole opinion of the Secretary-General, are impossib to verify or are not directly related to the loss of or damage to the premise

11. *Decides that*:

(*a*) Compensation for loss or damage to personal property of thi parties arising from the activities of the operation or in connection with t performance of official duties by its members shall cover the reasonab costs of repair or replacement;

(*b*) No compensation shall be payable by the United Nations for lo or damages that, in the sole opinion on the Secertary-General, are impossib to verify or are not directly related to the loss of or damage to the person property;

12. *Requests* the Secretary-General to take the necessary measures implement the present resolution in respect of the status-of-forc agreements in accordance with paragraph 40 of his report;[1]

1. A/51/903.

13. *Also requests* the Secretary-General to ensure that the terms of ference of the local review boards include the temporal and financial nitations on the liability of the Organization, as set out in paragraphs 8 11 above, and that those boards rely on those temporal and financial mitations as a basis for their jurisdiction and recommendations for mpensation for third-party claims against the Organization resulting om its peacekeeping operations.

### 24. Support account for peacekeeping operations*

*he General Assembly,*

*Recalling* its resolutions 45/458 of 3 May 1991, 47/218 A of 23 ecember 1992, 48/226 A of 23 December 1993, 48/226 B of 5 April 994, 48/226 C of 29 July 1994, 49/250 of 20 July 1995, 50/11 of 2 ovember 1995, 50/221 A of 11 April 1996, 50/221 B of 7 June 1996, 51/ 26 of 3 April 1997, 51/239 A of 17 June 1997 and 51/239 B of 15 eptember 1997 and its decisions 48/489 of 8 July 1994, 49/469 of 23 ecember 1994 and 50/473 of 23 December 1995,

*Reaffirming* its resolutions 51/243 of 15 September 1997 and 52/220 f 22 December 1997,

*Having considered* the report of the Secretary-General on the support ccount for peacekeeping operations,[1] the performance report on the use f support account resources for the period from 1 July 1996 to 30 June 997,[2] and the related report of the Advisory Committee on Administrative nd Budgetary Questions,[3]

*Raffirming* the need to continue to improve the administrative and nancial management of peacekeeping operations,

*Recognizing* the need for adequate support during all phases of eacekeeping operations, including the liquidation and termination phases,

*Recalling* its resolution 52/12 B of 19 December 1997, in which it ressed that enhancing the rapid deployment capacity of the United Nations peacekeeping could play a valuable role in the effectiveness of its sponse to a conflict, and, in this context, requested the appropriate organs consider, as a matter of priority, specific measures to that effect, in ccordance with General Assembly resolution 52/69 of 10 December 1997 nd taking into account the proposals to be submitted by the Secretary-eneral and the views of Member States.

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Resolution 52/248 adopted on 26 June 1998 without a vote.

28. A/52/837 and Corr. 1.

29. A/52/838

30. A/52/892

# BOOK REVIEWS

**Yuji Iwasawa, *International Law, Human Rights, and Japanese Law* *The Impact of International Law*, Published by Clarendon Press, Oxfor UK, 1998, pp.311+pp.314-342 (bibliography)+343-355 (index), Pri not mentioned.**

Professor Iwasawa of the University of Tokyo has written extensive on issues of relationship between international law and municipal la particularly the Japanese law. His article in the 1995 *Asian Yearbook International Law* deserves special mention.

There are several reasons why a student of international law must keen to learn the relationship between international law and the Japane domestic law. First and foremost, Japan is one of the few ancient countri of the world which have had the fortune of enjoying continued existen well into the third millennium. Despite being threatened by a few canno shots from the likes of Commodore Perry forcing it to open its doors wi enough to trade with the West, it was never colonized, unlike many of i more unfortunate Asian brethren. It would be interesting to study the effe of this historical continuity on the responses of the Japanese polity of toda to the evolving modern international law. Second, Japan was the onl Asian country which found itself on the "wrong" side of the Second Worl War. This and the resultant US-Japanese Peace Treaty, 1951, must hav had an impact on the subsequent developments in the Japanese law, *vis a-vis* modern international law. Third, Japan, being one the most importa economic powers, and the foremost in Asia, may have developed its ow special responses to the challenges of the international system. For thes reasons, Iwasawa's book must be readily welcomed.

The book under review, as the author states, "is an attempt to analys the relationship` between international law and national law in a Japanes context and demonstrate the impact international law has had on Japanes law". However, since the impact of international law on Japanese law ha been significant, "especially in the area of human rights", the primar focus of the book is on issues of human rights (Preface).

The book is divided into seven chapters - Introductory Chapter, th Treaty-Making in Japan, the Status of International Law in Japan, th Impact of International Human Rights Law on Resident Aliens in Japan, i impact on Women in Japan, its Impact on Detention in Japan, and th Concluding Chapter.,

The Japances Constitution of 1946 contains a unique provision i Article 73 (3) whereby the Cabinet has the authority to "conclude treaties on the condition that "it shall obtain prior or, depending on circumstance

sequent approval of the Diet". Iwasawa engages in an absorbing analysis various issues arising from practice relating to this provision - subsequent roval, effect of legislative disapproval, legislative power to 'amend' a ty, reservations and interpretative declarations and the role of the Diet, treaties and executive agreements. It is interesting to note that more n 90 per cent of the agreements being concluded by the Japanese ernment are executive agreements, not requiring legislative approval. s for the government to decide which agreement requires legislative roval and which does not (p. 20). However, it is generally recognized t (1) agreements having a bearing on statute making powers, (2) eements involving financial implications, and (3) politically important eements, all would require legislative approval. On the other hand, (1) eements concluded within the scope of an already approved treaty, (2) eements concluded within the scope of the existing domestic laws, and agreements concluded within the scope of budgetary appropriations, uld not. Yet, by and large, the broad executive discretion, despite a ecific express constitutional provision to the contrary, in deciding whether not the approval of the legislature should be obtained in respect of ification of a treaty, is rather reminiscent of the Commonwealth practice. that as it may, treaties to which Japan is a party has the force of law in pan, by virtue of Article 98 (2) of the 1946 Constitution. The Japanese urts have traditionally recognized the domestic legal force of international stomary law in Japan (p.31). In practice, however, this, as in the mmonwealth countries, would end up as an exercise by a court to cognize a proposition as a rule of international customary law, and then ad it into the Japanese domestic law. Perhaps, judicial eclecticism and bjectivity may be unavoidable in this respect. In all probability, the dicial process would prefer a just and equitable result in a given case, to finer nuances of the customary law rule it finds and transforms into the mestic law. Yet, precisely in this arena, that the Japanese judiciary has times made monumental contributions - see for example the *Shimoda* se (1964 *Japanese Annual of International Law*).

The learned author notes that the Japanese courts, like the courts of ost other countries, have summarily rejected the arguments based on commendations of international organizations, and cites the rejection by Japanese Supreme Court of arguments based not only on the UDHR, t also on the 1971 Declaration on the Rights of Mentally Retarded Perons, 1975 Declaration on the Rights of Disabled Persons and 1975 ECOSOC solution on Prevention of Disability and Rehabilitation of Disabled rsons, as these were mere ideas of the organization not binding on the embership. (Judgment of 2 March 1989). One wonders whether the preme Court would not have changed its appreciation of these

resolutions, if the ICJ Judgment in the Nicaragua case (1986) had b properly brought to its attention. This probably highlights the exist conceptual hiatus between international lawyers and their domes counterparts in the understanding of formation of international custo Quite possibly, domestic lawyers are not well equipped to expound process of international law making before the domestic courts, and b these lawyers, more often than not, the municipal courts are too immers in Austinian perspectives of jurisprudence.

The discussion of the Direct Applicability of International Law in Jap is quite interesting. The Japanese courts seem to require a very hi technical scrutiny more of the *content*, rather than of the process of formati of international customary law rule; they insist on "the substantive conditio on the creation, existence, and termination of a right, the procedu conditions on the exercise of the right, and moreover, the harmony of t rule with the existing various systems within the domestic sphere, and forth" (see p.78). This is in sharp contrast to the jurisprudence of the Indi courts which are more willing to read the Indian law in harmony wi international law, accept international customary law rules based on wide participated treaties and international conventions, and use such rules eve to fill up the gaps in the statute law, to meet the ends of justice in a give case. This jurisprudence is more forthcoming in the fields of human righ and environmental law, than in other fields. If the Japanese judiciary ca be criticized as being too conservative, its Indian counterpart can be blame for usurping the legislative and the executive functions, in a way and to th extent not originally envisaged by the Constitution-makers.

The discussion on the legal effect of acts of international organs is qui refreshing (pp.103-122).

On the usually controversial question of the nationality of Koreans Japan, the author is quite, remorselessly, forthright and of course his vie is correct from the viewpoint of human rights standards. He says: "Indee Japan should not have deprived all Koreans of their Japanese nationali unilaterally based on its own *koseki* (family registry) system, but shou have referred to the nationality laws of Korea and given to those Kore residents who wished to select Japanese nationality a chance to do so (p.133). He also points out that there is nothing on nationality in Article (a) of the Peace Treaty of 1951, whereby "Japan, recognizing th independence of Korea, renounces all right, title and claim to Korea". was in 1952, nine days before the treaty came into force, that the Directo General of the Civil Affairs Bureau in the Ministry of Justice issued Circular Notice to the officials concerned, announcing that all Korean including those residing in Japan, were to lose their Japanese nationali (p. 131). The author also considers that the mass denationalization

reans was contrary to Article 15 (2) of the UDHR, being an arbitrary privation of nationality. He suggests a legislative measure to remedy this torical wrong (p. 134). It is a pity that the Japanese judiciary refrained m playing a historic role in this regard. It could have interpreted the aty provision more rationally and held the administrative order *ultra es* the treaty.

Equally, the discussion on war compensation to aliens is interesting (pp 6-192). The Taiwanese *Soldiers* case and its aftermath opened a floodgate litigation, and complaints before international bodies. It is possible that vate war claims would keep coming up from all territories which went der Japanese occupation during the Second World War. There still exists ich dissatisfaction in the Pacific islands on this count. Evidently, there no law of prescription and limitation in international law to extinguish ch claims.

Speaking on the impact of human rights law on women in Japan, the thor finds that "the UN Decade of Women, and especially the Women's nvention, has had a substantial impact on Japan". It "brought about the *rd* reformation for Japanese women. Without the international movement, gnificant change would not have occurred - at least, not until much later." .246).

Before leaving this book to international law and domestic law scholars 1o must find it extremely incisive in analysis, and comprehensive in nvas, one must place on record a slight disappointment in its non-inclusion comparable Asian and African material, alongside the plentiful Western iterial utilized in its making.

That notwithstanding, there is no doubt that Professor Iwasawa has, rough this book, made a very significant contribution to both international v/domestic law interface as well as the international human rights law. : eminently deserves sincere congratulations.

V.S. MANI*

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**Abdulrahim Vijapur and Kumar Suresh (eds.),** ***Perspectives on Hu*** ***Rights*** **(Manak Publishers, New Delhi, 1999), pp. 402, Price Rs. 7**

The book titled "Perspectives on Human Rights" is a compilation series of articles presented in two seminars organized by the Center Federal Studies of Jamia Hamdard, New Delhi in April 1998 and Decen 1998, to commemorate the fiftieth anniversary of the Universal Declara of Human Rights (UDHR) which came into existence on 10 Decem 1948. This publication is timely and the credit goes to the authors who well known scholars for their painstaking efforts in editing and bring out this book.

The book focusses on various aspects relating to human rights. For convenience of the reader the book has been divided into six sectio Section one deals with the philosophy of human rights in its historical theoretical perspectives. Section two is centered around human rights India and Section three deals with issues relating to minorities, subordinate groups and their rights. Section four addresses environme and developmental issues *vis-a-vis* human rights. Section five advoca the importance of human rights education and the last section deals w human rights and international relations.

Section one comprising four chapters exclusively covers historical developmental aspect of human rights. The first chapter, "The Univer Declaration of Human Rights: A Cornerstone of Human Rights Regim written by Vijapur, provides an overview of the human rights provisi of the UN Charter, the UDHR, and the two International Covenants. Besi listing out the salient features of International Human Rights provisio the author provides the drafting history of the UDHR in detail and a suggests the ways for making human rights instruments effective in or to check gross violations of human rights. It is rightly pointed out that UN Charter has laid the foundation of movement for human rights u which a large body of human rights law has been structured. There seven articles under the United Nations Charter which deals with hum rights, they are as follows: Articles 1(3), 13(1) (b), 55, 56, 62, 68 and (c), which have been dealt by the author.

The discussion on origin, development and significance of the vari provisions envisaged in the UDHR forms second part of the chapter, addition to the incorporation of the views expressed by the representati of respective countries who had participated in the drafting stage of Declaration. These legal instruments no doubt played a significant role codifying a large body of human rights and succeeded in creating awareness in the world community but in practice these instruments h little relevance at least at the stage of their implementation and enforceme

because these instruments have not succeeded in bringing about any change in the behaviour and perception of nations about human rights. The remaining three articles under this section demand more substance according to their respective topics. This observation is not made to dilute the sincere efforts made by the authors.

Aspects pertaining to human rights in India are of prime concern in the second section which is comprised of five chapters. The first three chapters dwell upon the role of judiciary in the protection of human rights. The other two chapters touch upon aspects having topical relevance over contemporary Indian Society, i.e., on political violence and dowry-related crimes in India. The chapter titled, "Judiciary and the Protection of the Minorities in India" provides an in-depth study of the Constitutional provisions relating to the minorities. The Indian Constitution confers certain rights on minorities without identifying the minority groups or for that matter 'what constitutes a minority'. Precisely on this issue the Supreme Court of India has constituted a full bench division to define and identify the minorities and the minority groups. The author without taking cognizance of any of these substantive issues, covers certain procedural aspects pertaining to religious practice, uniform civil code, educational rights of the minorities. In this regard some important decisions rendered by the Supreme Court have been taken into consideration.

Promotion and protection of human rights under the Indian Constitution is the main theme of the next chapter in this section. The concept of human dignity, right to life and liberty and right to equality are, in general, highlighted in this chapter, which may be useful for beginners to keep abreast themselves about the Constitutional provisions relating to human rights. Broadly speaking, the author has tried to cover as many aspects as possible in a very limited scope.

Section III comprised of six selected articles focusses upon minorities, subordinate groups and protection of their rights. Interestingly, this chapter talks about certain societal violations in ancient times *vis-a-vis* modern upheavals. In India, societal violation of human rights is no less oppressive than State violation. It has been rightly pointed out by the author that organizations working to uphold civil liberties have paid little or no attention to this problem. The author has evaluated how hierarchical system (Social Stratification) ordained by *Varna Vyavstha (a divine sanction of Gita and Manusmriti)* is in contradiction with the provisions of the UDHR. As a matter of fact, the first two articles of the Declaration make it amply clear that freedom, equality and fraternity are the basis of human rights. In this context Articles 1 and 2 both have some relevance. Article 1 stipulates, "All human beings are born free and equal in dignity and rights" and Article 2 provides, "Everyone is entitled to all the rights and freedoms set

forth in this Declaration, without distinction of any kind". In a sense this particular writing has covered all important aspects related to the societal violation of human rights.

Another important writing under this section deals with developmental issues with reference to the rights conferred upon Scheduled Castes and Scheduled Tribes. The plurality of Indian society is unparalleled. The major issues discussed under this article are land reforms and poverty alleviation. In fact these are the issues which constitute the root cause for social stratification. It also touches upon the violation of civil rights and atrocities against *Dalits*. Relevant Constitutional provisions and other acts related with this aspect are properly acknowledged wherever required.

Exploitation of mineral wealth, the damming of rivers and mining of the land has led not only to a large scale of displacement of the tribal population but also to the degradation of the environment. On this issue, the author has rightly pointed out that mining not only displaces the local population but also causes severe environmental damage such as pollution of water and air, damage to agricultural land through dumping of toxic wastes and deforestation. It is pertinent to recall that the author himself at one point of time actively associated with the National Human Rights Commission of India had referred many complaints to the NHRC. For instance complaints relating to Sardar Sarovar Project or the Tehri Dam, are a clear indication of the continued lack of adequate care in comprehensive planning of mega- projects and rehabilitation of affected tribals.

Section IV, comprised of four articles, exclusively deals with environmental and developmental issues. The very first article highlights the issue of displacement due to developmental projects which amounts to violation of human rights. Economic liberalization has opened new vistas to Multinational Corporations (MNCs). Since 1991 several laws have been enacted to benefit MNCs to carry out their business without any let or hindrance. The author is severely critical of the developmental policy of the government permitting such human rights violations. The author cites three States (Gujarat, Orissa, Tamil Nadu) as examples of the worst hit because of developmental aspects. The most shocking fact is that 50 percent of the displaced are Scheduled tribes and 23 percent are Scheduled castes which belong to the lowest strata of the India Society. It is true that developmental projects are meant for poverty alleviation and economic growth but in India the converse is true, because they are affecting the already impoverished Scheduled castes and Scheduled tribes and other marginalised groups. To obviate such unintended results a clear cut line should be drawn between development related projects and displacement related issues.

Sections V and VI cover two areas of topical interest and contemporary elevance. The former is on human rights education and the latter is on uman rights and international relations. The suggestions proffered to nake human rights education a compulsory course in all primary educational enters are highly appreciated.

This scholarly work would certainly help researchers, academicians, ractising lawyers and persons involved in non-governmental organizations oncerned with the protection and promotion of human rights. It should ind a place in all educational institutions.

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**B.L. Wadehra, *Law Relating to Patents, Trademarks, Copyright & Designs* (universal Law Publishing Co. Pvt. Ltd., Delhi, 1999), pp. 517 and i-iii, price Rs. 280**

In recent times the law relating to intellectual property rights has become a subject of great debate, particularly in India. The international developments, including the creation of World Trade Organisation (WTO), have brought about a new dimension to this debate. While the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs Agreement) within the framework of WTO sought to establish world-wide uniform standards for the protection on intellectual property rights (IPRs), the issues relating to the technical aspects of IPRs remained confined to the statute books or to court battles. It is interesting to note that in many of the developed countries, particularly in the United States and Europe the technical aspects of IPRS such as patent specifications, filing, search, opposition proceedings, infringment proceedings etc. formed not only the part of the main debate, but also have evolved in various ways. This is particularly true with regard to infringement proceedings relating to IPRs.

The laws relating to IPRs in India are sufficiently self-contained as regards their procedural aspects are concerned. Keeping the WTO-standard debate apart, one should admit that the existing Indian laws on IPRs primarily took into account the Indian requirements and primarily sought to protect the Indian interests. The Indian Patents Act, 1970, for instance, provided a complete legal regime taking into account the needs and requirements of the Indian economy in a particular time and context. Presently, it is being argued that the Indian IPR system needs a complete updating in the light of the global technological developments. Any book on IPRs, in the Indian context, will have to take into account these aspects.

The objectives of the book under review are simply to "make the people aware" about the complex subject of IPRs. In five parts and as many as fifty-five chapters it seeks to deal with both Indian and international legal developments relating to IPRs, which, *inter alia*, include patents, trademarks, copyrights and designs. While attempting to deal with various aspects of IPRs, the book under review lacks coherence. In other words, there is no attempt made in the book to identify the primary issues which should engage the attention of the reader. The book essentially compiles in simple words the provisions of Patents Act, 1970, Copyright Act and other related enactments. In certain places, with a view to make the contents of the book interesting for the readers, the titles provided appear to be too simplistic. The case laws cited in various places and the discussion on various important IPR cases do not provide sufficient insight into the problems sought to be raised or answered.

The merit of the book lies in the fact that it compiles some useful formation relating to Indian laws relating to IPRs in a very simple language.

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# THE IMPACT OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA ON THE PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW

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## I. INTRODUCTION

The UN Convention on the Law of the Sea of 1982 (Convention) has eveloped and instituted several new legal principles.[1] This paper will rovide for a preliminary assessment as to whether and to what extent, uch principles have contributed to the progressive development of nternational law, in general, since the adoption of the Convention. The rinciples dealt with are the common heritage principle, the obligation o provide for transfer of technology and the general obligation of States o protect and preserve the marine environment. The list could be xtended, however, this would exceed the space allotted for this paper.

There is clear evidence that these principles have influenced the evelopment of international law, in particular, international environmental aw. These principles of the Convention as well as their counterparts in ther international agreements reflect a new *leitmotif* of international law, amely that in modern international relations States are under an obligation f solidarity *vis-a-vis* the community of States at large and — in particular nstances — *vis-a-vis* individual States. It is well established that nternational law has developed from a law of co-ordination into a law of ooperation.[2] Recent developments have added the principles of interstate olidarity[3] and intergenerational equity[4] thereto.

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I am grateful to Ms. Kerstin Mechlem for her technical assistance in the completion of the manuscript.

A distinction is to be made between "general principles of law recognized by civilized nations" as referred to in Article 38 (1) of the Statute of the International Court of Justice, and General Principles of International Law, see I. Brownlie. *Principles of Public International Law*, (London, 5th ed., 1998), at p. 18 *et seq.* with further references.

W Friedman, *The Changing Structure of International Law* N.Y., 1964, at 60 et seq.

R. St. J. Macdonald, "The Principle of Solidarity in Public International Law", *Etudes de droit international en l'honneur de Pierre Lalive* (Bale, 1993), p. 275 *et seq.*; B. Simma, "From Bilateralism to Community Interest in International Law", *RADI*, vol. 250 (1994-VI), pp. 221-384 at p. 238.

This aspect has been particularly emphasized by E. Brown Weiss, "AGORA: Our Rights and Obligations to Future Generations for the Environment"; *AJIL*, vol. 84 (1990), p. 198 *et seq.*; E. Brown Weiss, "In Fairness to Future Generations", *American University Journal of International Law and Policy*, vol. 8 (1992-1993), p. 19 *et seq.*

## II. LAW OF THE SEA PRINCIPLES

The common heritage principle[5] is set forth under different provisions of the Convention on the Law of the Sea. The most important of them is article 136 of the Convention according to which the Area and its resources are the common heritage of mankind. The significance of this principle for the legal regime established by the Convention becomes evident through article 311, paragraph 6, of the Convention. This article provides that there shall be no amendments to the basic principle relating to the common heritage of mankind set forth in article 136 of the Convention and that States parties to the Convention shall not become parties to an agreement derogating from the common heritage principle.

The common heritage principle had also found expression in the legal regime for the outer space. It was included in article 1 of the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space. From there it found its way into the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies. Article 1 of the Treaty states that the exploration and use of outer space shall be the common province of all mankind. The reference to the common heritage concept is more explicit in article 4, paragraph 1, and article 11 of the Agreement Governing the Activities of States on the Moon and other Celestial Bodies. According to the former "[t]he exploration and use of the moon shall be the province of all mankind and shall be carried out for the benefit and in the interests of all countries irrespective of their degree of economic or scientific development." Through this the cooperation of the States parties in all their undertakings concerning the moon and other celestial bodies has been made mandatory. Supplementing this obligation, article 11, together with article 5, defines the legal consequences following from the common heritage principle.

As far as the legal regime of Antarctica is concerned, the common heritage principle has been invoked to a lesser degree. At their 11th Consultative Meeting, the Antarctic Treaty Consultative Parties only emphasized in Recommendation XI-1, paragraph 5(d) that "the Consultative Parties, in dealing with the question of mineral resources of Antarctica, should not prejudice the interests of all mankind in Antarctica".

5. R. Wolfrum, "The Principle of the Common Heritage of Mankind", *Zeitschrift fur auslandisches öffentiliches Recht und Völkerrecht*, vol. 43 (1983), p. 312 *et seq.*; Simma, note 3, p 217 at p. 240.

The common heritage principle as contained in the Convention on e Law of the Sea has a negative as well as a positive aspect, the latter ing the one having a particularly innovative character.

According to article 137 of the Convention, no State shall claim or ercise sovereignty or sovereign rights over any part of the sea-bed d the ocean floor or its resources, nor shall any State or natural or ridical person appropriate any part thereof.[6] The legal regime ncerning outer space follows the same approach. Although the cupation of the high seas, including the sea-bed was already prohibited ior to the adoption of the Convention, article 136 explicitly states that such claim or appropriation or exercise of sovereignty or sovereign ghts shall be recognized. Thus, the prohibition of occupation and propriation has been given a legal status with a similar effect to that of s *cogens*. In line therewith, article 137 of the Convention is phrased as obligation of all States and not only the States parties to the nvention. In addition, since it is one of the objectives of the common ritage principle to preserve the present legal status of the international mmons effectively, it imposes obligations on individuals, too, as dicated by the term "appropriation".

Apart from this negative side, the common heritage principle roduces a revolutionary new positive element into the law of the sea providing that the control and management of the sea-bed and its sources is vested in mankind as a whole (articles 137, paragraph 2 and 7, paragraph 1, of the Convention). Mankind, in turn, is represented the International Sea-Bed Authority which is the organization through ich States parties organize and control deep sea-bed activities. Thus, ates parties are meant to act as trustees on behalf of mankind as a ole.

The introduction of the term "mankind", combined with the word eritage", further indicates that the interests of future generations have be respected in making use of the international commons. In line erewith, the principle requires that deep sea-bed or outer space activities ould avoid undue waste of resources, and provides for the protection the environment. It was accepted from the outset that the common ritage principle was meant to embrace the protection of the vironment.

The recognition and protection of intergenerational rights which is eady inherent in the common heritage principle has become the most

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R. Wolfrum, *Die Internationalisierung staatsfreier Raume* (Berlin, Heidelberg, 1984), at p. 395 *et seq.*

prominent feature of the principles of sustainable development[7] a common but differentiated responsibility[8] as enshrined in the leg regimes on the protection of the ozone layer,[9] on the protection of t climate[10] and on the protection of biological diversity.[11] The conclusi therefore is that these components of the environment have been declar to be the common concern of humankind.[12]

Finally, the common heritage principle is based on the idea interstate solidarity. This is clearly expressed in article 140 of t Convention. According to this provision, the activities in the sea-b area are to be carried out for the benefit of mankind as a whole, taki into particular consideration the interests and needs of developing State This article establishes the legal parameters for the regime on deep seab mining: equal participation of all States, sharing of revenues, transfer technology (so as to provide for equal participation), preferenti treatment of developing countries, protection against adverse effects a cooperation.

The legal regime for outer space does not provide for such elaborate system of utilization. Article 11, paragraph 7 (d), of the Mo Treaty only declares that one of the main purposes of the internation regime shall be the equitable sharing by all States parties of the benefi derived from those resources. At the same time the interests and nee of the developing countries, as well as the efforts of those countri which have contributed either directly or indirectly to the exploration the moon, shall be given special consideration.

The term "benefit" referred to in these legal instruments is to understood broadly. What matters, on the one hand, is the immateri benefit, i.e., the extension and deepening of man-kind's knowled

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7. P. Sands, "Principles of international environmental law", vol. I, "Framewor standards and implementation" (Manchester, 1995), at 198 *et seq.*, with furth references.
8. *Ibid.*, 217 *et seq.*, with further references.
9. Convention for the Protection of the Ozone Layer, 1985, *ILM*, vol. 26 (198 p. 1529; Protocol on Substances that Deplete the Ozone Layer, *ILM*, vol. 26 (198 p. 154. An introduction to the legal regime concerning the protection of the ozo layer against depletion is given by Sands, *ibid.*, at p. 259 *et seq.*
10. United Nations Framework Convention on Climate Change, 1992, *ILM*, vol. (1992), p. 849; Kyoto Protocol to the United Nations Framework Convention Climate Change, 1997, *ILM*, vol. 37 (1998), p. 22.
11. Convention on Bilogical Diversity, 1992, *ILM*, vol. 32 (1992), p. 822.
12. Concerning this notion, see R. Wolfrum, "Purposes and Principles of Internatio Environmental Law", *German Yearbook of International Law*, vol. 33 (1990), 308-330 at p. 322.

concerning the international commons. On the other hand, "benefit" also refers to the material gain from the use of the resources of the sea-bed and ocean floor as well as of outer space and its celestial bodies.

The second legal principle referred to is the obligation of States parties to the Convention on the Law of the Sea to provide for the transfer of technology.[13] It is not my intention to deal with the transfer of technology under Part XI of the Convention, but with the respective provisions under Part XII (Protection and Preservation of the Marine Environment), in particular articles 202 and 203, and under Part XIV (Development and Transfer of Marine Technology).

Article 202 of the Convention obliges States to give technical assistance, either directly or through international organizations, to developing countries to enable them to effectively fulfil their responsibilities concerning the protection of the marine environment. With the same aim article 203 of the Convention obliges international organizations to give preferential treatment to developing countries. This aspect again reflects the *Grundnorm* of solidarity. Since the protection of the marine environment is one of the main concerns of the community of States, it is a matter of consequence that developing countries receive respective technical assistance. This idea has been emphasized more strongly by the Conference on Environment and Development in Rio de Janeiro (1992) in coining the principle of common but differentiated responsibility. The provisions of Part XIV of the Convention (articles 266 to 278) follow the same approach although they serve a different objective. The obligations of States to promote the development and transfer of marine technology are meant to improve the technological capacities of States concerning the utilization, conservation and management of the marine environment, including its resources. As indicated, this obligation, too, has one of its foundations in the principle of interstate solidarity.

Finally, the Convention obliges States to protect and preserve the marine environment. When the relevant provision of the Convention, e.g. article 192, was adopted, it was considered to be a major step towards a more effective protection of the marine environment. This provision is based upon the consideration that the protection of the marine environment is the common concern of the community of States and serves the interests of this and future generations.

13 See, in general, P. T. Stoll, *Technologietransfer: Internationalisierungs — und Nationalisierungstendenzen* (1994), in particular at p. 389 *et seq.*

## III. NEW ENVIRONMENTAL PRINCIPLES

As already indicated, the Conference on Environment and Development of 1992 has confirmed several new environmental principles, amongst them the principle of sustainable development and the principle of common but differentiated responsibility. Both principles are based upon and further develop the aspects of intergenerational equity and solidarity among States already referred to.

The principle of sustainable development was first invoked in the Action Program "World Conservation Strategy", 1980 and was taken over by the Brundtland Report of 1987.[14] The latter defines sustainable development as "development that meets the needs of present and future generations". The principle of sustainable development is the *leitmotif* of the documents or agreements which were the result of the Conference on Environment and Development, e.g. the Declaration of Rio, the Agenda 21, the Convention on Biological Diversity and the Framework Convention on Climate Change.

The principle of sustainable development is generally considered to comprise four elements: the need to preserve natural resources for the benefit of future generations; the aim of exploiting natural resources in a manner which is rational; the equitable use of natural resources which means taking into consideration the needs of other States; and, finally, the need to ensure that environmental considerations are integrated in development plans or policies.[15] These four elements are closely related.

The issue of intergenerational equity is considered to constitute the central element of the principle of sustainable development. Broadly speaking, the principle sets limits on economic development if such development would result in a significant and lasting deterioration of the environment and thus imposes the costs of present development upon future generations.

The idea that components of the environment are to be preserved for future generations has been expressed in various international environmental agreements dating back to the period before the Brundtland Report. For example, the Convention on Natural Protection and Wildlife Preservation in the Western Hemisphere, 1940, seeks to protect and preserve in their natural habitat representatives of all species and genera of native flora and fauna, including migratory birds. The

14. Report of the World Commission on Environment and Development, Our Common Future (Oxford, 1989), p. 43.

15. Sands, note 7, at p. 199; a detailed analysis is provided for in A. Epiney and M. Scheyli, *Strukturprinzipien des Umweltvolkerrechts* (Baden-Baden, 1998), p. 42 *et seq.*

eamble of the International Convention for the Regulation of Whaling, 948, recognizes the interest of nations of the world in safeguarding for ture generations the great natural resources represented by the whale ocks; the African Convention on the Conservation of Nature and atural Resources, 1968 refers to soil, water, flora and fauna resources a capital of vital importance to mankind; and the Preamble of the onvention on International Trade in Endangered Species of Wild Fauna d Flora, 1973 (CITES) speaks of wild fauna and flora in their many autiful and varied forms as an irreplaceable part of the natural system the earth which must be protected for this and the generations to come. ther international environmental agreements follow the same approach. ey strive for the protection of the marine environment, of essential newable natural resources, of the environment in general, of water sources, of biological diversity and of the climate. International clarations also emphasize the aspect of intergenerational equity. This particularly true of the Stockholm Declaration of 1972 which, in its inciple 1, emphasizes that man bears "a solemn responsibility to protect d improve the environment for present and future generations." The io Declaration, instead, associates intergenerational equity with the right development; it provides in Principle 4 that "the right to development ust be fulfilled so as to equitably meet developmental and vironmental needs of present and future generations."

The second aspect, namely that natural resources — renewable as ell as non-renewable — are to be used rationally has significant nsequences in practice. Particularly with respect to the use of newable natural resources certain legal standards have already been veloped in the Convention on the Law of the Sea. These standards mit the exploitation to levels which preserve the productivity of the tural resource in question. The respective treaty provisions relating to sh stocks either speak of the maximum sustainable yield[16] or the timum utilization of the living resources.[17] The concept, however, does t only apply to renewable resources, but also to non-renewable ones. the latter respect, it has a different emphasis. Whereas regarding newable resources, the concept envisages the preservation of their production, regarding non-renewable resources it requires to stretch em and to make rational use of them. According to the principle it is cessary to apply all techniques which make best use of the resource. is includes searching for substitutes, the establishment or the use of cycling techniques and the avoidance of any form of waste.

Article 61, paragraph 3, of the Convention.
Article 62, paragraph 1, of the Convention.

The third element, namely the application of equity in the use o natural resources, predates the Rio Conference on Environment an Development. It originally focused on the allocation of natural resource or shared fish stocks, shared fresh water resources and, in particular, o the financial and other contributions to the protection of the environmen In this respect there is a strong interlinkage with the principle o common but differentiated responsibility. The element of equity plays decisive role in the Framework Convention on Climate Change whic requires the equitable allocation of emission rights and the Conventio on Biodiversity which requires the determination of an equitable sharin of the benefits arising out of the use of genetic resources.[18]

The fourth element, namely the obligation to integrate environment considerations into the economic policies as formulated in Principle 4 o the Rio Declaration has significant practical consequences which hav not yet been fully fathomed.[19] The demand for an integration o environment and development originated prior to the Stockhol Conference of 1972. Such a linkage was already emphasized at the firs United Nations Conference on Conservation and Utilization of Resource in 1949. In 1971, the General Assembly expressed the conviction tha development plans should be compatible with sound ecology and tha adequate environmental conditions can best be insured by the promotio of development both at the national and at the international levels Principle 13 of the Stockholm Declaration called on States to adopt a integrated and coordinated approach to their development planning s as to ensure that their development is compatible with the need to protec and improve the environment. The World Charter for Nature of 198 provided that the conservation of nature was to be taken into account i the planning and implementation of economic and social developmer activities and that due account was to be taken of the long-term capacit of natural systems in formulating plans for economic development.

The principle of common but differentiated responsibility is of mos recent origin. It has been formulated by the UN Conference o Environment and Development, 1992. Its basis lies in the application o equity as a *Grundnorm* of international law. According to Principle 7 o the Rio Declaration, "States shall cooperate in a spirit of globa partnership to conserve, protect and restore the health and integrity o the earth's ecosystem. In view of the different contributions to globa environmental degradation States have common but differentiate

18. R. Wolfrum and P.T. Stoll, Access to Genetic Resources under the Convention o Biological Diversity and Law of the Federal Republic of Germany, *Forschungberich* (Berlin, 1996).

19. For a detailed analysis see Sands, note 7, at p. 205 and *et. seq.*

sponsibilities". This principle was reiterated in article 3, paragraph 1 f the Framework Convention on Climate Change, according to which e States parties are required to "protect the climate system for the benefit f present and future generations of humankind, on the basis of equity ıd in accordance with the common but differentiated responsibilities ıd respective capabilities." Finally, article 10 of the Kyoto Protocol iterates the obligation of all States parties under article 4 of the Climate hange Convention, taking into account their common but differentiated sponsibility.

This principle was voiced previously in the Declaration of The Hague f 11 March 1989.[20] That Declaration acknowledged that the evelopment of new strategies and principles, including innovative ecision-making and implementing mechanisms, was necessary. The eclaration further emphasized that it was necessary to assist those that ere neither technologically nor economically in a situation to do so to chieve these objectives. Although the principle of common but fferentiated responsibility was not directly invoked, this Declaration ready contained elements of it. Further elements concerning the rinciple were already contained in Resolution 44/228 of the General ssembly which convoked the UN Conference on Environment and evelopment.[21] Its Preamble emphasized the relevance of effective ational measures to protect the environment, equally indicating that chnological and economic capabilities were to be taken into onsideration. The Resoultion pointed out that the developing countries eeded new financial resources to participate in the attempt to limit ollution.[22]

The principle contains several clearly distinguishable elements. The rst element is that the responsibility concerning the world climate is a ommon one, which means all States have an obligation to cooperate in e preservation of the climate. This changes the focus of international ıvironmental law, which is already to a large degree dependent on a ose interestate cooperation, to the extent that coopertion is not only a ecessity but an obligation, given the nature of the threat to the world imate. Several international agreements already emphasize that certain sues are the common concern of humankind or of the community of

). Declaration of the Hague, 1989, *ILM*, vol. 28 (1989), p. 1308.

A/Res/44/228 of 22 December 1989.

. This is to be understood as referring to financial incentives for the more effective implementation of environmental standards, see on the introduction of economic and financial incentives in particular P. Sand, "International Economic Instruments for Sustainable Development: Sticks, Carrots and Games", *IJIL*, vol. 36 (1996), p. 1 *et seq.*

States. The close relationship with the rationale of the common herita principle is evident.

A further aspect of the principle of common but differentiat responsibility is that the preservation of the world climate exists not on for the benefit of present generations, but for the benefit of future one too. In that respect, a certain element of intergenerational equity applied. This second aspect firmly endorses the obligation to coopera It is, in fact, conceptually impossible to avoid cooperation when it serv the purpose of protecting the well-being of future generations.

The third element of the principle of common but differentiate responsibility is that the obligation it enshrines is a differentiated on This means that the different capabilities of technological or econom nature are to be taken into consideration when the obligations concernin the protection of the environment are specified. States have to contribu their particular share to the common objective. The extent of the share a matter of further specification, but the common but differentiate responsibility principle as formulated in the Rio Declaration already give an indication of the elements that are to be taken into consideratio namely the different stages of development and the contributions certain States to harming the climate or components of the worl environment. Here again the close connection with the principles fro the UN Convention on the Law of the Sea is apparent.

Even before the principle of common but differentiated responsibilit was formulated several international environmental agreemen acknowledged that environmental commitments were to be implemente taking into consideration the scientific, technical and economi capabilities of respective States parties. The wording differs, but th respective provisions clearly indicate that environmental commitmen are not absolute ones but have to be adjusted reflecting the capabiliti of States concerned.

The fourth element of the principle is the new one. According to i parties from developed countries shall provide new and addition financial resources to enable parties from developing countries to me the incremental costs of the latter for implementing their commitments. The obligation to provide for new and additional financial resources well as to provide access to relevant technology is part of th responsibility of parties from developed countries, since they are able contribute more to the common cause. That the financial obligation

23. See R. Wolfrum, Means of Ensuring Compliance with and Enforcement International Environmental Law, *RADI*, 272 (1998-I), pp. 9-154 at p.123 *et se*

rt of the general commitment of parties from developed countries has en highlighted in the Convention on Biological Diversity as well as in e regimes concerning the protection of the ozone layer and the climate. oth conventions provide that the extent to which parties from developing untries will effectively implement their commitments under the nventions will depend on the developed country parties' effective plementation of their commitments related to financial resources and nsfer of technology. This does not mean that a developing country rty may withdraw if a developed country party violates its obligations. t it does mean that the obligations of each group are inter-related and utually dependent. This is a further elaboration of the principles shrined in Parts XII and XIV of the Convention on the Law of the Sea.

## IV. CONCLUSION

This *tour d'horizon* has shown that the UN Convention on the Law the Sea marks the beginning of a transforming process for international w. Its traditional objective to coordinate activities of States is pplemented by the introduction of the principle of solidarity. This inciple works on two levels: the interstate and the intergenerational e. It results in the strengthening of cooperation between States, the tablishment of new institutions and the cooperation of States with the ter. It further results in creating treaty obligations for industrialized d developing countries which are reciprocal and mutually dependent. nally, the new legal developments have reaffirmed and broadened the ea that certain issues require the full attention of the community of ates and can be managed effectively by common efforts only.

# NUCLEAR ARMS CONTROL TREATIES AND NON-PARTIES

RAVINDRA PRATAP*

## I. INTRODUCTION

A treaty generally bears consequences for the parties. For third stat which are not parties, the treaty is, as a matter of principle *res inter al acta*. Therefore, agreements neither impose obligations nor confer rig upon thirds — *pacta tertiis nec nocent nec prosunt*. At the same tim however, international practice shows many deviations from th principle expressing themselves in international agreements by a formu in favour of a non-party—*pactum in favorem tertii*, and by designati a negative relationship to a third state or states—*pactum in odium tert*

The international response following the recent nuclear tests by Ind and Pakistan tends to blur the distinction between unilateral sanctio based on domestic law and non-parties' obligations to a treaty und international law. The United Nations Conference on Disarmament (C stated on 14 May 1998, that India's decision broke the internation *norm* against nuclear test established by the 1996 Comprehensive Te Ban Treaty (CTBT), negotiated at the Conference.

A two-pronged approach is adopted in the paper to address this ne albeit a long brewing, international reality: an analysis of the prese international law to discern rules governing obligations on non-parti to a treaty; and, then to apply those rules on relevant treaties to determi the precise nature and scope of obligations on non-parties.

## II. RULES GOVERNING OBLIGATIONS ON NON-PARTIES TO A TREATY

The scope of this part extends to an analysis of international la applicable to non-parties to a treaty. This will be discussed under t following headings: the law of the UN Charter; the law of the Vien Convention of 1969; customary law; judicial decisions; and jurist opinion.

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The author is grateful to Professor V.S. Mani, International Legal Studies Divisi Jawaharlal Nehru University, New Delhi, India, for his kind help in preparation this paper. Mistakes are the author's only.

## A. The Law of the UN Charter

ticle 2 paragraph (6) provides

> The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

This is one of the key provisions of the Charter, establishing ationship between the United Nations and non-members.[1] This orresponds to the last unnumbered paragraph of Chapter II of the mbarton Oaks Proposals",[2] and is a "consequence of the fact that the rpose of the United Nations... is not only to maintain peace within the ganization but within the whole international community, that is to : to maintain world peace".[3] In the present conext, a question arises ether Article 2 paragraph (6) is capable of having any legal effects at on states which are not members of the United Nations. The question bbraces two opposite views. One accords the provision a legal status flective of the comprehensive authority laid down in the Charter which kes "precedence over the principle of non-interference in the domestic fairs of other states .., if the maintenance of international peace and curity is in jeopardy".[4] According to Hans Kelsen, "the Charter tablishes a true legal obligation of Members to behave in a certain ay only if it attaches to the contrary behaviour a sanction. If the Charter aches a sanction to a certain behaviour of non-Members, it establishes true obligation of non-Members to observe the contrary behaviour".[5]

The other opinion holds that Article 2 paragraph (6) is no more pable of imposing obligations on third states without their consent an any other international agreement. Goodrich and Hambro share this ew. According to them, "the Charter does not of course create any gal obligations for states not Members of the Organization. They are

Other provisions are: Article 4 (admission of membership); Article 11 paragraph (2) (the right to bring questions before the General Assembly); Article 32 (participation in discussions of the Security Council); Article 35 paragraph (2) (submissions by non-members); Article 50 (the right of non-members affected by Security Council measures to consult the SC); Article 93 paragraph (2) (the right to become a party to the Statute of the International Court of Justice); Article 102 (registration of treaties).

Leland M. Goodrich and Edvard Hambro, *Charter of the United Nations: Commentary and Documents* (New York, 1946), p. 70.

Hans Kelsen, *The Law of the United Nations* (London, 1950), p. 106.

Bruno Simma (ed.), *Charter of the United Nations — A Commentary* (Oxford, 1994), p. 132.

Note 3, p. 107

therefore not obligated in a legal sense to act according to the Princip of the Charter for any purpose whatsoever".[6] However, the Unit Nations is "certainly authorised to ensure that non-member states sh act in conformity with the principles laid down in Article 2, paragrap 3, 4 and 5"; and "violation of these principles may lead to the applicati of the enforcement measures provided in Chapter VII if the Securi Council considers such violations as a threat to or breach of the peace. For non-Members, "the Charter system therefore provides for t imposition, by force if necessary, of the prescribed conduct without a legal basis in contractual agreement".[8]

The Report of Rapporteur of Subcommittee I/1/A to Committee I of the San Francisco Conference did not interpret Article 2 paragrap (6) implying obligations on non-Members. The Report stated:

> The vote was taken on the understanding that the association of the United Nations, representing the major expression of the international legal community, is entitled to act in a manner which will ensure the effective co-operation of non-member states with it, so far as that is necessary for the maintenance of international peace and security.[9]

During the discussion on this provision at the twelfth meeting of th Committee, the representative of Uruguay asked "how a non-Membe could be brought within the sphere of the Organisation and how th Organisation could impose duties upon non-Members."[10] The Rapporteu replied that "the paragraph was intended to provide a justification fo extending the power of the organisation to apply to the actions of nor Members."[11] The representative of Belgium considered this "a mos important provision"[12] and "felt that the Organisation could ignore th claim made by non-Member because it would be the authorise expression of the international legal community."[13] The leader of th Australian delegation agreed that this was "a difficult provision t enforce but that it was an essential one..."[14]

6. Note 2, p. 71.
7. Note 3, p. 109.
8. Note 2, p. 71.
9. U.N.C.I.O. Doc. 739, I/1/A/19(a), p. 6.
10. U.N.C.I.O. Doc. 810, I/1/30, p. 7.
11. *Ibid.*
12. *Ibid.*
13. *Ibid.*
14. *Ibid.*

One reason contributing to varied interpretations is linguistic nuances he provision. The French version[15] of Article 2 paragraph (6) can e easily be interpreted in a narrow way than the English version.[16]

Universal membership of the Organization has rendered Article 2 agraph (6) as one of receding relevance. However, in the past practice he United Nations, the provision was referred to on quite a few asions. For instance, Poland referring to Article 2 paragraph (6) posed to take enforcement measures under Articles 39 and 41 against in, a non-member because "the existence and activities of the Franco ime in Spain have led to international friction and endangered ernational peace and security."[17] Quoting the provision the resentative of Ploand said, "the fascist regime in Spain does not act accordance with the Principles of the United Nations, nor has it ever en any evidence that it intends to do so. It endangers the maintenance international peace and security. It is, therefore, the duty of our anization to ensure that any nation, whether a Member or not, does endanger international peace and security."[18]

Article 2 paragraph (6) was referred to in the Security Council solution[19] on southern Rhodesia[20] and the aspect of securing versality of sanctions by including non-Members was also strongly phasized.[21] The General Assembly has adopted a number of olutions[22] involving the principles of the Charter addressed variously "all states", "all nations", "every state", and "all members and all er states". The Security Council did, however, distinguish different els in so far as it referred to the obligations of Member states to plement the operative parts of resolutions, whereas non-members were ply appealed to or urged to act in accordance with those resolutions.[23]

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*"fait en sorte que"*, i.e. the organs of the UN should pay particular attention to the observance of the Principles by members and non-members alike. See, note 4, p. 134.

"shall ensure that", indicates that non-members are drawn into a purposeful task with the aim of achieving certain results. *Ibid.*

G.A. Res. 32(I), 9 February 1946.

*Ibid.*

SC Res. 409 (1977), para. 4.

*Yearbook of the United Nations*, (1977), p. 201.

SCOR (21), 1340 mtg., 16 December 1966, para. 38.

See, in particular, G.A. Res. 2734 (XXV), 16 December 1970, Declaration on the Strengthening of International Security.

See, SC Res. 232 (1966), 253 (1968), 314(1) (1972), 388 (1976), 409 (1977), and 591 (1986). Article 17 of the Covenant of the Legue of Nations provided that in the event of a dispute involving a state not a Member of the League the state should be invited "to accept the obligations of membership", "for the purposes of such dispute" upon conditions deemed just by the Council.

The Charter displays in Article 2, paragraph (6) "the tendency to the law not only of the whole international community, that is to say be general, not only particular, international law."[24] Thus, "both Covenant and the Charter must therefore be regarded as having se limit determined by the general interest of the international community to the rule embodied in Roman law maxim *pacta tertiis nec nocent prosunt*, (agreements neither confer rights nor impose obligations non-parties) and no organ "established under the Charter would be liberty to hold that action taken in pursuance of Article 2 is contrary international law."[26]

### B. The Law of the Vienna Convention of 1969

Article 34, as the general rule regarding third states, provides:

> A treaty does not create obligations or rights for a third State without its consent.[27]

This general rule exemplifying *pacta tertiis nec nocent nec prosu* The International Law Commission considered that "there appears to almost universal agreement"[28] upon such a rule. It follows, therefo from the general rule that treaties may create obligations for non-part with their consent.[29] Article 35 of the Vienna Convention thus provid

> An obligations arises for a third state from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.[30]

J.G. Starke points out that "it is questionable whether this is r exception; an arguable point is that the treaty itself in conjunction w the written acceptance of the obligation may constitute a compos tripartite arrangement, and such an interpretation seems to be suppor by Article 37 paragraph (1):[31],

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24. Note 3, p. 109.
25. R.Y. Jennings and Arthur Watts, *Oppenheim's International Law*, vol.1 (Lond 1992), Parts 2-4, p. 1326.
26. *Ibid.*
27. *ILM*, vol. 8 (1969), pp. 679-96 at p. 685 (hereinafter the "Vienna Conventio
28. Commentary (Treaties), Article 30, para. (1) *YILC* (1966), vol. 2, p. 226.
29. See, India-Pakistan agreement of 1973, containing stipulations requiring actio Bangladesh and in which the government of Bangaldesh concurred. *ILM*, vol. (1973), p. 1080.
30. Note 27, p. 685.
31. J.G. Starke, *Introduction to International Law* (London, 1989), p. 446.

Vhen an obligation has arisen for a third State in conformity vith Article 35, the obligation may be revoked or modified only vith the consent of the parties to the treaty and of the third State, inless it is established that they had otherwise agreed.[32]

t would be pertinent to distinguish between modification of the treaty ision as such and modification of the obligation for third state to h that provision has given rise. While the former is a matter solely he parties to the treaty, the latter requires the consent of the non- es.[33]

Treaties may affect obligations of non-parties even though not ing them *stricto sensu*: e.g., where a treaty between states X and Y ts more widespread commercial rights than state X has earlier ted to state Z under an MFN clause of a treaty.[34] Such third states ot generally invoke the principle of non-discrimination as a basis being assimilated to the position of the specially favoured state: on basis of principle of non-discrimination or rules of customary rnational law, no general right of whatever scale of treatment is ted by a state to the most favoured other state.[35] Similarly, obligations on-parties affect where a treaty requires a party to it to divest itself s obligations under a treaty with other states,[36] or where a treaty rmines an individual's nationality with consequent effects for third es.

Two exceptions to the *pacta tertiis* principle regarding obligations . First, obligation in relation which arises for an aggressor state "in sequence of measures taken in conformity with the Charter of the ed Nations with reference to the aggression";[37] and second, a rule oming binding on non-parties if it becomes a part of international om.[38] The second exception is the subject of our inquiry in the owing section.

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Note 27. p.686.
Note 28, p. 230.
See, Article I of the General Agreement on Tariffs and Trade, which subject to certain exceptions, provides for general unconditional most-favoured-nation treatment between all parties to the GATT. Another important multilateral MFN provision is Article 18 of the Montevideo Treaty of 18 February 1960 establishing a Free Trade Area and instituting the Latin American Free Trade Association.
Note 25, p. 1326.
See Article 234 of the Treaty of Rome 1957 establishing the EEC and Article 292 of the Treaty of Versailles 1919.
Article 75 of the Vienna Contention.
Article 38 of the Vienna Convention.

## C. Customary Law

Article 38 of the Vienna Convention provides:

> Nothing in Articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.[39]

The notion of generation of custom by way of treaty (hereinaf "generation") developed in the work of the International L Commission. the Fifth Report of Gerald Fitzmaurice states:

1. Law-making or norm-enunciating treaties, in the nature of gene multilateral conventions, codifying branches of existi customary international law, or establishing new rules by way the progressive development of international law, and in so as they evidence declare or embody legal rules or legal regim which are, or eventually become, recognized as being of univer validity and application, constitute vehicles whereby such ru or regimes are or become generally mediated so as also to bi States not actually parties to the treaty as such.
2. In any such case however, it is the rule of customary internatio law thus evidenced, declared or embodied that binds the thi State, not the treaty as such.[40]

No distinction was made between the formation of customary law way of generation and its embodiment in a treaty, *via* codification Humphrey Waldock's Third Report was confined to generatio However, the ILC Draft transcended the bar and covered all declarato rules:

> Nothing in Articles 58 to 60 precludes rules set forth in a treaty from *being binding* upon States not parties to that treaty if they have become customary rules of international law.[42]

Following the 1966 ILC debate, the provision reverted to generati only contained in the present Article 38 of the Vienna Convention. T *travaux préparatoires* confirm that Article 38 cannot *per se* enjoy binding force *qua* contractual obligation; but the material rule to whi it refers, will apply *qua* customary law *erga omnes*, to parties and no parties *pari passu*.

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39. Note 27, p. 687.
40. *YILC* (1960), Part II, pp. 80-85.
41. Commentary (Treaties), Article 16, para. 59. *Ibid*., p. 95.
42. *YILC* (1964), Part II, pp. 184 (emphasis added).

The existence of a written text (a conventional rule) is a precondition generation of customary law, though it has only a stimulating ction. It is state practice and *opinio juris* which lead to the emergence customary law. To the question whether certain Articles of the 1907 gue Convention (IV) were binding on several belligerents non-parties he Convention, the Nuremberg Tribunal held:

> the rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption. But, the Convention expressly stated that it was an attempt "to revise the general laws and customs of war", which it thus recognized to be then existing, but by 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war...[43]

In the *North-Sea Continental Shelf* cases, Denmark and the therlands contended inter alia that Article 6 paragraph (2) of the neva Convention on Continental Shelf 1958, containing the idistance principle for the delimitation of continental shelves, had erated new customary law and was, as such, binding on the Federal public of Germany, a non-party.[44] The Court said:

> [T]here is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed. At the same time this result is not lightly to be regarded as having been attained.[45]

d, the Court said before such a rule becomes binding on third States, nust be:

> a norm-creating provision which has constituted the foundation of, or has generated a rule which, while conventional or contractual in its origin, has since passed into the general corpus of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the convention.[46]

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*Judgment of the International Military Tribunal at November of 1946*. Reproduced in *AJIL*, vol. 41 (1947), p. 248.

*ICJ reports (1969)*, p. 37.

*Ibid.*, p. 41.

*Ibid.*

The Court therefore concluded:

> .... such a rule has come into being since the Convention partly because of its own impact, partly on the basis of subsequent State practice — and that this rule, being now a rule of customary international law binding on all States...[47]

Earlier, in the *Norwegian Fisheries* case the conclusion of the Cou that there has been "the general toleration of foreign states"[48] was bas on the conduct of the United Kingdom, the state whose interests we particularly affected, and on that of France. To a request to consid "new accepted trends" of UNCLOS III, the Court, in *Libya/Mal Continental Shelf* case said:

> the Court ... could not ignore any provision of the (LoS) draft convention if it came to the conclusion that the content of such provision is binding upon all members of the international community because it embodies or crystallizes a pre-existing or emergent rule of customary law.[49]

The interplay between a treaty and customary law was recognized b the Court in the *Nicaragua* case:

> The existence of identical rules in international treaty law and customary law has been clearly recognized by the Court in the *North Sea Continental Shelf cases*... there are no grounds for holding that when customary international law is comprised of rules identical to those of treaty law, the latter "supervenes" the former, so that the customary international law has no further existence of its own.[50]

The process consummating a conventional rule into a norm c customary law "is the closest approximation to true legislation offere by international law",[51] and to this extent the United Nations, wher most of the multilateral conventions are adopted, may be mentioned as *forum* signifying "transition from traditional custom-making t

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47. *Ibid.*
48. *ICJ Reports (1951)*, p. 139.
49. *ICJ reports (1982)*, p. 38. In the *UK-France Continental Shelf Arbitration*, the Cou stated that "the rules of cusotmary Law" — namely a delimitation based on equitab principles — "lead to much the same result as the provisions of Article 6 *International Law Reports*, vol. 54 (1977-78), p. 8.
50. *ICJ Reports (1986)*, p. 94.
51. Mark E. Villiger, *Customary International Law and Treaties* (Dordrecht 1985 p. 197.

ernational legislation by treaty".[52] And "the fiction that the Court olve controversies according to law whereas the Assembly and the uncil settle political disputes, and therefore, that the resolutions of se organs cannot be sources of law, simply has no validity any ger... Even if there is no real creation of norms, there is often legal ognition and confirmation that certain practices or principles are, in judgment of an organ largely representative of the international nmunity, either customary rules or general principles of international v."[53]

*State practice: resolutions of the political organs of the United Nations*

early as 1962, the World Court held:

> — [T]he functions and powers conferred by the Charter on the General Assembly are not confined to discuss, consideration, the initiation of studies and the making of recommendation: they are not merely hortatory.[54]

The United Nations represents "the general legal order of unorganized ternational society, a decentralized and scarcely institutionalized stem, lacking organs specifically entrusted with the creation of law".[55] nd "diversity of forms for expressing the members' consent"[56] and ne successive, complementary and integrative character of the different ases of this creative process"[57] makes it "difficult to determine at what ecise moment the new rule came into being."[58]

In *The International Society as a Legal Community*, Judge Mosler s summarized his view of General Assembly resolutions:

> After quite a long and fierce dispute it now seems that extreme views, on the one hand that resolutions have no binding effect at all and on the other hand that they have a legislative effect, have been abandoned and that a generally accepted view is emerging. there can be no single answer to the questions — resolutions

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Dissenting Opinion of Judge Tanaka in the *South-West Africa* cases *(Second Phase), ICJ Reports (1966)*, p. 294.

Jorge Castaneda, *Legal Effects of United Nations Resolutions* (New York, 1969), pp. 4-5.

*Advisory Opinion on the Certain Expenses of the United Nations, ICJ Reports* (1962), p. 163.

Note 53, p. 105.

*Ibid.*, p. 107.

*Ibid.*

*Ibid.*

must be distinguished according to various factors, such as the intention of the General Assembly, the content of the principles proclaimed and the majority of their adoption.[59]

Resolutions, forming material evidence of state practice, may eit be adopted by consensus or by a division of votes, will now be discuss seriatim as part of customary law inquiry.

*(a) consensus*

Consensus is a method for reaching a decision without voting in t absence of formal objection. From the point of view of substance, consensus is normally a compromise in which opposing views a reconciled.[60] In the consensus process the majority forgoes its right impose a text on the minority, but in turn expects good faith acceptan of the consensus text.[61]

The view that consensus may be regarded as source of internation law has been supported and denied by numerous authors. In 196 Richard Falk wrote that consensus is replacing consent as a basis international legal obligation.[62] Anthony D'Amato goes even further saying that consensus is not a source of international law — it international law.[63] There is thus considerable legal fiction in the idea

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59. (1980), pp. 8-9.
60. Blaine Sloan, "General assembly Resolutions Revisted (Forty Years Later)," *BYI* vol. 58 (1987), p. 91.
61. Mohammad Bedjaoui, *Towards a New International Economic Order* (New Yor 1977), p. 186. It will be useful to see the consensus on hijacking adopted by t United Nations Security Council on 20 June 1972, whereby it called for co-operati by states against hijacking and hijackers and the consensus adopted in June 19 by the Special Committee of Twenty Four of the United Nations on Decolonizati denouncing South Africa's continued administration of Namibia (South-West Afric In the course of the sessions, 1973-82, of the Third United Nations Conference the Law of the Sea the provisions of the draft text of the Convention opened f signature on 10 December 1982, were adopted by consensus.
62. "On the Quasi-Legislative Competence of the General Assembly", *AJIL*, vol. (1966), p. 783.
63. "On Consensus", *Canadian Yearbook of International Law*, vol. 18 (1980), p.12 Others who support this view in varying degees include : Oliver Lissitzy *International Law Today and Tomorrow* (New York, 1965), pp. 35-6; E. Jimén de Aréchaga "General Course in Public International Law", *RADI*, vol. 159 (197 I), p. 31; Christopher C. Joyner, "UN General Assembly Resolutions a International Law: Rethinking the Contemporary Dynamics of Norm-Creation "*California Western International Law Journal*, vol.11 (1981), p. 464; D.W. Bowe *The Law of International institutions* (London, 1975), pp. 412; Edward McWhinne *The World Court and the Contemporary International Law Making Process* (T Hague, 1979), p.16; Rahmatullah Khan, "The Legal Status of the resolutions of t United Nations General Assembly," *IJIL*, vol. 19 (1979), pp. 554-9.

sent, and for the majority the element of consent is not an essential ment in the formation of customary law.[64] However, the issue is ether a consensus expressed through resolutions of the General sembly is a sufficient manifestation of the position of states to be a is for the authority or force of those resolutions. The answer may pend on the circumstances of the case and the intent.[65] If the consensus reached on what is clearly intended as a non-binding recommendation, n the effects depend on hortatory and good faith considerations. If consensus is based on the existence of a rule of customary ernational law or a general principle of law or if it is an interpretation the Charter, its authority enjoys the colour of a traditional source.[66]

*vote*

The number of votes and the voting patterns are also considered as st important factors in measuring the weight of resolutions[67] in the mation of rules of customary international law. The element of voting not relevant regarding the legal effect of resolutions of binding nature. wever, the degree of support is relevant to a number of legal effects.[68] solutions which are adopted unanimously, or nearly unanimously, or consensus[69] reflect the will of the international community greater if ctified with the votes of those states whose support may be necessary

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C.H.M. Waldock, "General Course on Public International Law," *RADI*, vol. 106 (1962-II), pp. 49-53; H.L.A. Hart, *The Concept of Law* (London, 1961), pp. 220-1; H. Meyers, "How is International Law made? — The Stages of Growth of International Law and the Use of its Customary Rules," *Netherlands Yearbook of International Law*, vol. 9 (1978), pp. 18-9.

Note 60, p. 92. See also, Obed Asamoah, "The Legal Effect of Resolutions of the General Assembly," *Columbia Journal of Transnational Law*, vol. 3 (1964-5), pp. 48-9, 51; C.W. Jenks, *A New World of Law?* (Longman, 1969), pp. 205-11.

Note 60, p.92.

Aréchaga, Note 63, pp. 31-2; Maurice Mendelson, "The Legal Character of General Assembly Resolutions: Some Considerations of Principle," in Kamal Hossain (ed.), *Legal Aspects of the New International Economic Order* (London, 1980), p. 95; H.G. Schermers, *International Institutional Law* (The Hague, 1980), p. 615, Quincy Wright, "Custom as a Basis for International Law in the Post-War World," *IJIL*, vol. 7 (1967), p. 9; Inis Claude, "Collective Legitimization as a Political Function of the United Nations," *International Organization*, vol. 20 (1966), p. 375.

Rosalyn Higgins, "The United Nations and Lawmaking: The Political Organs," *Proceedings of the American Society of International Law*, 64th Annual Meeting (1970), pp. 41-2; Egon Schwelb, "The Nuclear Test Ban Treaty and International Law," *AJIL*, vol. 58 (1964), pp. 645-6; Stephen M. Schwebel, *Digest of United States Practice in International Law* (New York, 1975), p. 85.

Unaccompanied by reservations.

for effective implementation and states from all economic and leg systems.[70] If support comes from only certain groups of states, with oth groups voting against, this is of course a negative factor[71] in developi a prescriptive norm of customary international law.

There is no agreement among publicists as to the effect of abstentio at the time of adoption of resolutions. A large number of abstentions comparison to affirmative votes would certainly evidence a lack enthusiasm for the resolution, however the better view to treat abstention as a general rule, as acquiescence.[72]

A recommendation is not translated into a legal obligation simply b being re-affirmed or re-cited[73] no matter how many times. Thus "a vot for a resolution cannot express any conviction of legal obligation, statement on the General Assembly or elsewhere can do — and ofte does — just that".[74]

Thus, resolutions of the political organs reflecting state practice a the highest level may become the starting point for the consolidation o a principle of international law towards fully accepted customary law While the potential legal effects of these resolutions should not b overestimated, "in the case of unanimously adopted resolutions o principles of law, a contributory effect towards the creation of a nev rule of customary international law cannot be ruled out".[75]

*(ii) Opinio juris*

This is the acknowledgement by states non-parties to treaty generative of a putative norm of customary law that their conduct or the abstentior therefrom is a matter either of right or of obligation. The materia

70. Mosler, note 59, p. 258; Higgins, note 68, p. 29; Claude, note 67, p. 375.
71. Schwelb, note 68, pp. 645-6.
72. Michael B. Akehurst, "Custom as a Source of International Law," *BYIL*, vol. LVI (1974-75), pp. 6-7; Lissitzyn, note 63, p. 36; D'Amato does not favour this viev but would apply consideration of estoppel. Note 63, pp. 113-5.
73. S.A. Bleicher, "The Legal Significance of Recitation of General Assembl Resolutions," *AJIL*, vol. 63 (1969), p. 444.
74. Ian MacGibbon, "Means for the Identification of International Law: General Assembl Resolution, Custom Practice and Mistaken Identity", in Bin Cheng (ed.) *Internationa Law Teaching and Practice* (London, 1982), p. 24.
75. Note 53, p. 135. "It is necessary to distinguish between the vote of a state and it actual practice in the matter: it is not unknown for a state to vote in one sense, bu in fact to behave in a contrary sense". See, *Oppenheim's International Law*, not 25, part 1, p. 49. In *Nicaragua* case, the Court found that the existence of the necessar *opinio juris* could "with all due caution" be deduced from the attitude of states t the relevant resolutions. *ICJ Reports (1986)*, pp. 99-100.

ctice[76] of such a state vis-à-vis that treaty may take either of the two ms: acquiescence or persistent objection. The former gestures a mination, the latter depicts a denial of obligation crystallized ofessedly *via* customary process. This subjective element may be luced from various sources, including the conclusion of bilateral or ltilateral treaties, attitudes to resolutions of the General Assembly and ier international meetings, and statements by state representatives.

According to MacGibbon "generalizations concerning the process which rules of customary international law are formed do not always knowledge that a rule may be expressed in terms either of a right or of obligation and that it may involve both the protection of the right in estion and the acknowledgement of the correlative duty. Consideration ich apply to a rule expressed as a right or as a liberty may well be appropriate to a rule expressed as a duty or as a prohibition."[77] The t that "claims may conflict to a greater or less degree lends nplication to the process of determining what part, if any, of differing ims and practices in respect of a particular matter have crystallized o customary practices with legal sanction. It is probable that only by ference to protest and acquiescence can this question be resolved".[78]

*) acquiescence*

MacGibbon defines acquiescence as a "form of silence or absence protest in circumstances which generally call for a positive reaction gnifying an objection".[79] To Hudson, the elements necessary to tablish the existence of a customary rule are "the concordant and curring action of numerous states in the domain of international ations, the conception in each case that such action was enjoined by v, and the failure of other states to challenge that conception at the ne."[80] Failure to protest against the conviction that the practice is joined by law is not equivalent to acquiescence in the practice itself.[81] owever, "acquiescence in refusals to submit to a given practice, or quiescence in a contrary practice on the part of other states, affords gent evidence that the practice is not followed on the basis of a claim

Note 25, part 1, p. 28.

I.C. MacGibbon "Customary International Law and Treaties", *BYIL*, vol. 34 (1957), p. 116.

*Ibid.*, pp. 118-9.

I.C. MacGibbon "The Scope of Acquiescence in International Law," *BYIL*, vol. 31 (1954), p. 143.

*Permanent Court of International Justice*, 1920-1942 (New York, 1943), p. 609.

Note 79, p. 151

of right and that submission to its exercise is not regarded as obligato — in short, that it is not an international custom".[82] To a question wheth silence may conclusively be interpreted as amounting to acquiescen would depend primarily on the circumstances in which the silence observed. According to Anzilotti, "silence maintained by a state after situation had been notified or had become generally known could fair be interpreted as acquiescence and as the abandonment of claims to t contrary, if, by virtue of either special agreements or general practic the occasion was one on which the state could, or ought to, hav protested,[83] Similarly, Verykios said that long silence maintained witho reason is equivalent to consent.[84]

*(b) persistent objection*

A state which objects to an *evolving* rule of general customar international law can be exempted from its obligations. Hence, a state required to have actively and persistently[85] maintained an objection t the evolving rule of law. One writer feels that a state which "opposes th rule in the early days of the rule's existence (or formation) and maintain its opposition consistently thereafter" may prevent a rule of customar international law from becoming binding on it".[86] In the *Anglo Norwegian Fisheries* case, the International Court of Justice made a alternative finding that a coastline delimitation rule put forward by th United Kingdom "would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to th Norwegian coast".[87] Increased attention to the persistent objector rul may also reflect the emphasis on state sovereignty that the newl emerging states have encouraged.[88]

The persistent objector rule is difficult to reconcile with the vie that consent is not required before a rule of customary law can bind th state.[89] Brierly, however, both accepted the persistent objector rule an

82. Note 77, p. 118.
83. Quoted from MacGibbon, note 79, p. 170.
84. *Ibid.*
85. There exists a difference of opinion as to whether the objection must be persisten some authorities refer to the rule as the "persistent objector rule," and others refe to it as the "objector rule" or 'dissenting State rule".
86. Akehurst, note 72, p. 24. See also MacGibbon, "Some Observations on the Part o Protest in International Law," *BYIL*, vol. 30 (1953), pp. 318-9.
87. *ICJ Reports* (1951), p. 131.
88. Akehurst, *A Modern Introduction to International Law* (London, 1984), pp. 19-2
89. J.I. Charney, "The Persistent Objector Rule And the Development of Customar International Law," *BYIL*, vol. LIV (1985), pp. 4-5.

:ted consent as a necessary element of customary law formation.[90] vnlie argued for the rule by reference to a dependence of custom on ent.[91]

D'Amato does not accept the persistent objector rule. To him, the rule ncompatible with the theory that public international law is not founded the specific consent of states to rules of law".[92] He states that the orities cited in support of the persistent objector rule either "do not ort the rule in fact or are limited to situation in which a special, rather general, rule of customary international law is relevant".[93] He has, fore, based his analysis on the distinction between general and special ional)[94] customs. Relying on the *Asylum* case he concluded that a istent objector, "although bound by general customary law, is not ld by regional custom". Thus, it appears that the persistent objector "is, at best, only of temporary or strategic value in the evolution of of international law".[95] Customary international law "is not static. It ges as the patterns of State behaviour change and *opinio juris* evolves flect current realities of obligation. Extant rules of law are subjected hange. Nations forge new law by breaking existing law, thereby ing the way for other nations to follow. Ultimately new patterns of aviour and obligation develop".[96]

### *udicial Decisions and Arbitral Awards*

The general rule that a treaty does not create either obligations[97] or

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J.L. Brierly, *The Law of Nations* (London, 1963), p. 52.

Ian Brownlie, *Principles of Public International Law* (London, 1979), pp. 10-11.

Anthony D'Amato, *The Concept of Custom in International Law* (New York, 1971), p. 261.

*Ibid.*, at pp. 233-4.

See *Asylum* case, *ICJ Reports (1950)*. The ICJ held that: "The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the state granting asylum and a duty incumbent on the territorial State," (p. 276). And, "the Court cannot therefore find that the Colombian government has proved the existence of such a [regional or local] custom. But even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru which, far from having by its attitude adhered to it, has, on the contrary, repudiated it...," pp. 277-8.

Note 87, p. 24.

Gerald Fitzmaurice, "The General Principles of International Law considered from the Standpoint of the Rule of Law," *RADI*, vol. 92 (1957-II), p. 113.

Subject to exceptions discussed earlier. See, in particular, Article 38 of the Vienna Convention.

rights for a third state without its consent: *pacta teriis nec nocent* *prosunt*, is so well established that there is "no need to cite exten authority for it."[98] However, "as subsidiary means for the determina of rules of law",[99] mention may be made of the decisions of judicial arbitral tribunals in cases concerning treaties containing *odium te* stipulations.

In the Arbitration on the *Cession of Vessels and Tugs for Naviga on the Danube* between four of the former Allied Powers and four of former Central Powers, the Arbitrator accepted the Romanian submiss that it was not bound by the Armistice of 3 November 1918 between Allied and Associated Powers and Austria-Hungry, for, at that ti Romania was not one of the Allied and Associated Powers.[100] In Arbitration on the *Frontiers between Colombia and Venezuela*, one the issues was the effect of the lack of any protest by Venezuela agai the Treaty of 1907 between Brazil and Colombia. In this treaty, Colom had purported to cede to Brazil a territory which was in dispute betwe Colombia and Venezuela. The Swiss Federal Council, as Arbitrator, h that Venzuela's silence could not be interpreted against her, becau vis-à-vis Venezuela, the Treaty was *"res inter alios acta."*[101]

The Permanent Court of International Justice in its Adviso Opinion on the *Nationality Decrees in Tunis and Morocco* he that treaties concluded between a protecting Power and a protect state *opposable* to third states only within the limits of the conse expressed, or recognition granted, by such third States.[102] In t *Eastern Carelia* case, the Court held that non-member states "r bound by the Covenant. The submission, therefore, of a dispu between them to the methods provided for in the Covenant cou take place only by virtue of their consent. Such consent, howev has never been given by Russia. On the contrary, Russia has, several occasions, clearly declared that it accepts no interventi by the League of Nations in the dispute with Finland."[103]

98. Note 25, parts 2-4, p. 1261.
99. Article 38(1)(d) of the Statute of the International Court of Justice.
100. *Report of International Arbitral Awards (RIAA)*, vol.1 (1921), p. 112.
101. *RIAA*, vol. 1 (1922), p. 262.
102. *(1923), PCIJ, Series B, No. 4*, p. 92.
103. *(1923), PCIJ, Series B, No. 5*, pp. 27-8. The Court refused to countenance interpretation of Article 17 of the Convenant which required non-members State submit any dispute to the jurisdiction of the League or the Court. And, as the equat put to the Court related to the main issue in the actual dispute between Finland the Soviet Union, the Court considered itself precluded from rendering even advisory opinion on the question submitted to it by the League Council.

The Arbitrator Kaeckenbeeck found, in the *Acquistition of Polish ionality* between Germany and Poland, that for the purpose of ermining the meaning of terms in treaties binding on Germany and and, treaties concluded between Poland and other states were levant, as Germany was not a party to the treaties. Conversely, the horitative determination of these issues by the Arbitrator between many and Poland could not affect the interpretation of other treaties, the scope of *res judicata* was equally strictly limited to the parties to Arbitration.[104] Judge Huber, in *Report III* (1924) on the Spanish Zone Morocco claims of great Britain, as Rapporteur, stated that the right diplomatic protection of third states could not be in any way impaired consequence of bilateral agreements between the protected state and protecting power".[105] It was held in the *Ottoman Debt* Arbitration , as Bulgaria was not a party to the Peace Treaty of Lausanne of 3, she could not be bound by any of its articles. Bulgaria's obligation arding Ottoman Debt had to be determined exclusively by reference he Peace Treaty of Neuilly of 1919 between the Allied and Associated vers and Bulgaria.[106]

Again, in the *Island of Palmas* case, Judge Huber reiterated the non-osable nature of a treaty concluded between Spain and the United tes implying Spanish sovereignty over the island at the time of cession the Philippine archipelago to the US.[107] In the *Clipperton Island* case question was whether Article 35 of the General Act of Berlin of 5, which imposed the duty of notification on the new territorial uisitions in Africa was relevant as between France and Mexico. The itrator held that not only was the island in question situated outside ica, but also the Act bound "only the signatory power of whom xico was not one."[108] And, in the *Interpretation of Article 181 of the ice Treaty of Neuilly (Merits)*, the Arbitrator found that Greece could on the Treaty of Constantinopole of 1913 between Bulgaria and the oman Empire only because of the incorporation of this treaty by ress reference into the Peace Treaty of Neuilly of 1919.[109]

New realities in inter-state relations found reflection in the sprudence of the Court as well. Whilst in principle the *pacta tertiis*

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*RIAA*, vol. 1 (1924), pp. 412-3.
*RIAA*, vol. 2 (1924), p. 648.
*Ibid.*, p. 551.
*Ibid.*, pp. 842-3, 850 and 866.
*Ibid.*, p. 1110.
*RIAA*, vol. 3 (1933), pp. 1416-8. See also, the Abitration on *German Reparations under Article 260 of the Peace Treaty of Versailles*, *RIAA*, vol. 1 (1924), p. 440; and *Sopron-Koszeg Railway*, *RIAA*, vol. 2 (1929), pp. 967-9.

rule remains good, an organization may possess capacity to br international claims against both members and non-members:

> The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of states has already given rise to instances of action upon the international plane by certain entities which are not States... Fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and *not merely personality recognized by them alone,* together with capacity to bring international claims.[110]

Judge Alvarez in his Dissenting Opinion on the *Reservations to t Genocide Convention* case (1951) observed:

> These conventions signed by a great majority of states ought to be binding upon the others, even though they have not expressly accepted them.[111]

In the *Namibia (South West Africa)* case, the Court said:

> .... South Africa's continued presence in Namibia having been declared illegal, it is for non-member States to act in accordance with these decisions.[112]

The jurisprudence of the Court "has tended to recognise a type treaty which although contractual in origin and character, possesses existence independent of and transcending the parties to the treaty". The Court held in the case concerning the *Status of South West Afric*

> The international rules regulating the mandate constituted an *international status* for the Territory recognised by all the Members of the League of Nations, including the Union of South Africa.[114]

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110. *Reparation for Injuries Suffered in the Service of the United Nations, ICJ Repo (1949)*, pp. 178, 184 (emphasis added). See also the Dissenting Opinion of Jud Krylov at pp. 218-9.
111. *ICJ Reports (1951)*, p. 52.
112. *ICJ Reports (1971)*, p. 56.
113. Note 25, part 1-2, p. 1205.
114. *ICJ Reports (1950)*, p. 133 (emphasis added).

d the Court continued:

> .... the termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law.[115]

e key pronouncement on the subject was made in the judgement in *Barcelona Traction Co.* case:

> ... an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State... By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*... Some of the corresponding rights of protection have entered into the body of general international law...; Others are conferred by international instruments of a *universal or quasi-universal* character.[116]

Unilateral declarations of the non-party to a convention expressed *a omnes* may evidence an intention to be legally bound, although h a posture constitutive of obligations should "not lightly to be sumed", and that a "very consistent course of conduct"[117] is required such a situation. In the *Nuclear Tests* case[118] the criteria of obligation re: the intention of the state making the declaration that it should be nd according to its terms: and that the undertaking be given publicly. s criterion found application in the *Nicaragua* case[119] and also in the *se Concerning the Frontier Dispute (Burkino Faso* v. *Mali).*[120] The igation thus created may take the form of estoppel, resting on nciples of good faith and consistency.[121]

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Note 111, p. 56.

*ICJ Reports (1970)*, p. 32 (emphasis added). The sources of these obligations enumerated by the Court include: outlawing of acts of aggression, and of genocide, principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. See also, *Nicaragua* case *ICJ Reports (1986)*, p.134.

Note 44, p. 25.

*(Australia* v. *France)*, *ICJ Reports (1974)*, pp. 267-71.

Note 116, p. 132.

*ICJ Reports (1986)*, 573-4. For comments see, Alfred Rubin, "The international legal effects of unilateral declarations", *AJIL*, vol. 71 (1977), pp. 1-30.

Bowett enlists three essentials of estoppel: the meaning of the statement must be clear and unambiguous; the statement or representation must be voluntary, unconditional

State pleadings illustrate two aspects of estoppel. First, that a sta barred from pleading its own default as a justification for avoidin international obligations; and second, the rule that prior recognitio or acquiescence in, a situation, or a previous admission by a state ba from subsequently challenging what it has recognized or admitted. found manifestation in the *Temple of Preah Vihear*[122] case wh Thailand sought to avoid a frontier agreement on the ground of er The Court held that Thailand was precluded by its conduct from asser that it did not accept the treaty. In the *Arbitral Award by the Kin Spain,*[123] the Court held the award valid and stated that it was no lo open to Nicaragua, who, by express declaration and by conduct, recognized the award as valid, to challenge its validity.

The principle of good faith set forth in Article 2 paragraph (2) of Charter, was reflected in the Declaration of Friendly Relations Betw States,[124] in the Final Act of the Helsinki Conference (1975) embodied in Vienna Convention, has also received increasing judi attestation in recent times:

> Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation...[125]

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and authorised; reliance in good faith upon the representation of the one part the other party to his detriment (or to the advantage of the party making representation), "Estoppel Before International Tribunals And Its Relation Acquiescence," *BYIL*, vol. XXXIII (1957), p. 184. Other cases where the prin was found to be applicable in some form include: *Tinoco Arbitration* Case (1 in *AJIL*, vol. 18 (1924), p. 147; *Diversion of water from the Meuse (Netherl v. Belgium*; *PCIJ (1937), Series A/B, No. 70*, pp. 18-25; *Chorzów Factory Indem case, PCIJ (1927), Series A, No. 9*, p. 31; *German Interests in Polish Uper Sil PCIJ (1926), Series A, No. 7*, pp. 21-4; *Nottebohm case (second phase), ICJ Rep (1955)*, p. 17; *Nicaragua* case *(Jurisdiction), ICJ Reports (1984)*, pp. 411-3; *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), ICJ Rep (1988)*, p. 105. See also Hersch Lauterpacht, *Private Law Sources and Analo of International Law (London, 1927)*, p. 204; Georg Schwargenberger, " Fundamental Principles of International law", *RADI*, vol. 87 (1955) I, pp. 290- and I.C. MacGibbon, "Estoppel in International Law," *ICLQ*, vol. 7 (1958), p. and Oscar Schachter, "Non-Conventional Concerted Acts," in M. Bedjaoui ( *International Law: Achievements and Prospects* (The Hague, 1991), p. 265.

122. *ICJ Reports (1962)*, p. 32.
123. *ICJ Reports (1960)*, p. 213.
124. G.A. Res. 2625 (XXV) of 24 October 1970.
125. Note 118, p. 268.

But, in the *Border and Transporter Armed Actions (Nicaragua* v. *onduras),* the Court said:

> The Principle of good faith is one of the basic principles of governing the creation and performance of legal obligations... it is not in itself a soruce of obligation where none would otherwise exist.[126]

et, in the Advisory Opinion on the *Legality of the Threat or Use of uclear Weapons*, the Court held unanimously:

> There exists an obligation to pursue in good faith and to bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control. [127]

The emphasis on good faith *stricto sensu* and no trace of Article VI f the NPT in the Advisory Opinion amounts, in effect, to good faith *to sensu* — envisaging obligations on parties and non-parties *pari ssu*. The Court's observation in the *North Sea Continental Shelf* cases relevant here:

> ... it is characteristic of purely conventional rules and obligations that... general or customary law rules and obligations ... have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour ... when rules or obligations of this order are embodied, or are intended to be reflected in certain provisions of a Convention a right of unilateral reservation is not conferred, or is excluded.[128]

Does this refer to those rules from which no derogation is permissible? nd if it does, then there is "some apparent confusion between the enerality of a rule of law and its classification as *jus cogens*..."[129] How, ien, do we identify peremptory norms of international law? "There is o simple criterion",[130] admitted the International Law Commission in s 1966 Report. But, the word "emerges" in Article 64 of the Vienna onvention, which contemplates new rules of *jus cogens*, shows that it ould be one of the norms of customary international law. In 1974, the ourt characterized the principle of good faith as one of:

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26. *ICJ Reports (1988)*, p. 105.
27. *ICJ Reports (1996)*, p. 36.
28. Note 44, pp. 38-9.
29 Hugh Thirlway, "The Law And Practice of The International Court of Justice," *BYIL*. vol. LX (1989), p. 102.
30. p. 76.

> Trust and confidence ... *inherent* in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential.[131]

Whether this inference of good faith in a treaty of universal charact has sublimized into peremptoriness, and whether treaties creating *er omens* obligtions complement or enlarge upon *erga omnes* obligatio flowing from *jus cogens*, "remain to be worked out in the practice states and in the jurisprudence of international tribunals."[132] The onu again, lies more on the Court inasmuch as Article 66 of the Vienn Convention provides for the judicial settlement of disputes concernin the application and interpretation of Articles 53 and 64.

*E. Juristic Opinion*

It is perhaps needless to insist on the important role played by juris in the development of international law,[133] but with the growth c international judicial activity and of the practice of states evidenced b widely accessible records and reports, it is natural that reliance on th authority of writers as evidence of international law should tend t diminish.[134] It is obvious that subjective factors[135] "enter into an assessment of the teachings of the most highly qualified publicists of th various nations,"[136] the latter remain, however, among the "subsidiar means for the determination of rules of law".[137]

Juristic opinion may serve to evidence not merely of established[13 customary rules, but of "customary rules which are bound in course o time to become established".

D.J. Harris regards the *pacta tertiis* rule as one which "undoubtedl reflects customary international law."[139] And, James Crawford doubt any relationship of this rule with that of *jus cogens*:

> States simply do not have, in the absence of consent, the competence to deprive other States of their legal rights by way of treaty. A treaty attempting to impose duties on third States is not void — as is a treaty in violation of a *jus cogens* norm. It

131. Note 118, p. 268 (emphasis added).
132. Note 25, part 1, p. 8.
133. J.G. Starke, *Introduction to International Law* (London, 1989), p. 50.
134. Note 25, part 1, p. 43.
136. Note 98.
137. *Ibid.*
138. Note 132, p. 51.
139. D.J. Harris, *Cases and Materials on International Law* (London, 1991), p. 781

merely provides a possible set of rules which are, in the absence of the consent of the State or States affected, non-opposable.[140]

But as Paul Guggenheim says "it is not particularly in international to make an inventry of the effective individual and superior general ns, in view of the often disputed claim of validity and efficacy of the ns. That is true above all for the rules of law not directly created by states. These are the norms of customary law created not through scious purpose and in a decentralized way."[141]

To a question that how can a near universal treaty be taken as erful or even conclusive proof of customary international law binding on-party and perhaps overriding other evidence of the state of omary international law, Richard Baxter enlists a series of arguments:

In the *first place*, the treaty is clear evidence of the will of states, free of the ambiguities and inconsistencies characteristic of the patchwork of evidence of state practice that is normally employed in proving the state of international law. *Secondly*, the convention which was hypothesized constitutes one common statement of the law by virtually all states, which does not require the process of harmonization and reconciliation that normally goes into the extraction of a rule of law from the hodge-podge of evidence presented to tribunal or other form of decision maker. *Thirdly*, the hypothetical treaty is fully contemporary in that, so long as states are parties to it, it speaks as of the present moment and does not... reflect a view of the obligations of international law securely anchored in the past. *Finally*, if one requires a sense of legal obligation, *opinio juris sive necessitatis* that sense is unambiguously present in a treaty, to which states become parties with full realization that they thereby assume legal obligations and may claim legal rights."[142]

role of intention embedded in the treaty text has been emphasized D'Amato:

If the structure of a treaty is such that it manifests an intent to have certain provisions generalizable into rules of customary

James Crawford, *The Creation of State in International Law* (London, 1979), p. 80.
Paul Guggenheim,"What Is Positive International Law?" in George A. Lipsky, *Law and Politics in the World Community* (The Hague, 1953), p. 28.
"Treaties and Custom," *RADI*, vol. 129 (1970), pp. 36-8. "If there be other inconsistent evidence of state practice, surely that evidence must yield to the more contemporary, the more uniform, and the more pervasive view reflected in the treaty itself". *Ibid.*

> international law while reserving other provisions solely to the treaty, then that intent should be given weight in assessing whether a particular provision can be cited as having generated a rule of customary law. [143]

But, in the words of Baxter, the process of transition from a tre rule into customary international law is:

> ... different from the way in which evidence of customary international law is derived from codification treaty. This requires a three fold test: *First*, proof of the rule of customary international law; *Second*, evidence that the treaty contains the same rule; *Third*, demonstration that the treaty is evidence of the state of customary international law.[144]

There are rules of international law of universal application, contained in a treaty, opposable to non-parties without their conse Judge Alvarez in his Dissenting Opinion on *Reservations to the Genoci Convention* (1951), said:

> These conventions signed by a great majority of States ought to be binding upon the others, even though they have not expressly accepted them.[145]

Falk, writing in 1966, defined the core of obligation as "a generaliz preference among nations for orders, reinforced ... by the associati between ideas of *fairness,* and *respect for law*..."[146] Proliferation states and judicial activity as a result of increased inter-state relatio have given rise to certain general principles, such as estoppel t requirement of which, in Hersch Lauterpacht formulation:

> may be rooted in the continuing need for at least a modicum of stability and for some measure of predictability in the pattern of State conduct the basis of which is the general principle of good faith recognized in many systems of law. [147]

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143. Note 92, p. 110.
144. "Multilateral Treaties as Evidence of Customary International Law", *BYIL*, vol. X (1965-66), pp. 295-6.
145. *ICJ Reports (1951)*, p. 52.
146. Richard Falk, "Respect For International Law And Confidence in Disarmament", Richard A. Falk and Saul H. Mendlovitz (eds.), *The Strategy of World Orde Disarmament and Economic Development* (Princeton, 1966), pp. 367-8 (emphas added).
147. Hersch Lauterpacht, *Private Law Sources and Analogies of International La* (London, 1927), p. 204.

Rosalyn Higgins argues that "international law is not rules. It is a rmative system. All organized groups and structures require a system normative conduct — that is to say, conduct which is recognized by h actor, and by the group as a whole, as being obligatory, and for ich violation carries a price".[148] Since the 19th century especially by aties among European States claiming to be valid *erga omnes*, have led a new dimension to the prima facie rule of *pacta tertiis*:

> The emergence of obligation *erga omnes* and growing recognition of *jus cogens* show that an individualistic view of public international law relating only to the legal position of individual states is giving way to a new perception of international, pays more attention to the communitarian aspect of the world order".[149]

"International Law", says Georg Schwarzenberger, "on the level of organized international society does not know of any *jus cogens*",[150] t Shabtai Rosenne argues that "the concept of *jus cogens* had existed international law for a long time, even if in inchoate form".[151] Alfred rdross has classified three types of *jus cogens*: those existing in the mmon interest of the whole international community; those created humanitarian purpose; and those introduced by the Charter of the N against the treaties or use of force in international relations.[152] But fact remains, as pointed out by Ian Sinclair, that *jus cogens* is:

> a concept so widely supported in doctrine and in writings of jurists has found so little application in state practice.[153]

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3. "International Law And The Avoidance, Containment and Resolution of Disputes," *RADI*, vol. 230 (1991) V, p. 25.

). Note 4, pp. 137-8. See also, Eric Suy, *The Concept of Jus Cogens in International Law* (New York, 1967), Egon Schwelb, "Some Aspects of International Jus Cogens as Formulated by the International Law Commission", *AJIL*, vol. 61 (1967), pp. 946-75; B.S. Murty, "*Jus Cogens* in the Law of Treaties", *Proceedings of Indian Society of International Law*, 5th Annual Conference (1968), pp. 10-24; R.P. Dhokalia, "Problems Relating to *Jus Cogens* in the Law of Treaties", in S.K. Agarwala, *Essays on the Law of Treaties* (New Delhi, 1972). pp. 149-77; V. Nageshwar Rao, "*Jus Cogens* and the Vienna Convention on the Law of Treaties", *IJIL*, vol. 14 (1974), pp. 362-85; L.A. Alexidze, Legal Nature of *Jus Cogens* in Conemporary International Law, *RADI*, vol. 172 (1981) III, pp. 219-70; G. Gaja, *Jus Cogens beyond the Vienna Convention, ibid*, pp. 271-316.

) *Current Legal Problems*, vol. 18 (1965), pp. 191-214; and *International Law and Order* (London, 1971), pp. 27-56.

. *YILC* (1963), vol. I, 685 mtg., para 4.

2 "*Jus Cogens and Jus Dispositivism, AJIL*, vol. 60 (1966), p. 59.

3 Ian Sinclair, *The Vienna Convention on Law of Treaties* (Manchester, 1984), p. 21.

Thus, the *pacta tertiis* rule is subject to the following princip considerations: the principle that states which are not members of th United Nations act in accordance with the Principles[154] necessary maintain international peace and security, and the rule that in the eve of a conflict between the obligations of the Members of the Unite Nations under the Charter and their obligations under any othe international agreement, their obligations under the Charter sha prevail;[155] *odium tertii* sitpulations in a treaty;[156] a rule set forth in treaty becoming binding upon a state non-party to such a treaty as customary rule of international law;[157] the rule that a state is not boun by an evolving rule of general customary international law if that stat has actively and persistently maintained an objection to such a rule;[15 obligations *erga omnes*, though there is no fixed enumeration of thes but which would definitely include obligations deriving from th outlawing of acts of aggression, genocide, and principles and rule concerning the basic rights of the human person[159] and which may eve be created by the actions of limited number of states,[160] e.g., treatie creating objective regimes,[161] such as NWFZs (Nuclear Weapon Free Zone Treaties) and may also include obligations to protect th environment;[162] norms of *jus cogens*[163] distinguished by their relativ indelibility,[164] though not always of consensual recognition[165] and ye find application and interpretation in the judicial settlement of disputes;[16 the rule that prior recognition of, or acquiescence[167] in a situation, or a previous admission by a state bars it from subsequently challenging wha it has recognized or admitted; unanimously adopted resolutions of the General Assembly though certainly exert a strong persuasive influence

154. Sovereign equality, performance of obligations in good faith, peaceful settlement of disputes in conformity with the principles of justice and international law, and prohibition of the threat or use of force. For a historical account of these principles see V.S. Mani, *Basic Principles of Modern International Law* (New Delhi, 1993)
155. Article 103 of the Charter.
156. Articles 35 and 37 paragraph (1) of the Vienna Convention.
157. Article 38 of the Vienna Convention.
158. See note 87.
159. Note 116, p. 32; *YILC* (1976), part 2, p. 99.
160. Notes 110 and 115.
161. Note 115.
162. Note 25, p. 415.
163. Article 53 of the Vienna Convention.
164. Note 34, p. 513.
165. Article 64 of the Viènna Convention; note 148.
166. Article 66 of the Vienna Convention.
167. Note 80.

it would be too wide a construction to construe that a mmendation becomes binding by way of estoppel;[168] unilateral arations must be mirrored in the considerations of good faith, *lato u*[169] and *stricto sensu*.[170]

## III. APPLICATION OF THE RULES GOVERNING OBLIGATIONS ON NON-PARTIES TO NUCLEAR ARMS CONTROL TREATIES

### A. UN Charter Obligations

There has been a discernible pattern in the attitudes of the political ns of the United Nations to equate NACTs, in particular treaties prising the so-called non-proliferation regime,[171] with matters relating eace and security. [172] The Charter of the United Nations confers on Security Council primary responsibility for the maintenance of rnational peace and security,[173] but this responsibility is not usive.[174] The reasons for giving primacy to the Security Council are rstandable: that it is a continuously functioning body and that it is a ller executive body with permanent membership of major powers. resolution adopted on 5 June 1998 following nuclear tests by India Pakistan, the Security Council:

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Notes 65 and 75, "It may become binding by consent, and by consenting to it, a state may then be estopped from challenging it. Where consent is given subject to the overing consideration that recommendations are not binding no estoppel can be created". See MacGibbon, note 121, p. 45.

Note 118, p. 268.

Note 126, p. 105.

Treaty on the Non-Proliferation of Nuclear Weapons, 1968, *Status of Multilateral Arms Regulation and Disarmament Agreements,* vol. 1 (1992), pp. 110-93. The Comprehensive Test Ban Treaty, 1996, *ILM*, vol. XXXV (1996), pp. 1439-78.

G.A. Res. 49/75 H, adopted on 15 December 1994, "*attaches great importance* to the contribution which the treaty on the Non-proliferation of Nuclear Weapons has made to the peace and security of the world since its entry into force in 1970; and *urges* States not parties to the Treaty on the Non-Proliferation of Nuclear Weapons to accede to it at the earliest possible date recognizing the importance of the universality of the Treaty". *Yearbook of the United Nations*, vol. 48 (1994), p. 146. Among the key non-parties Pakistan voted in favour, India and Israel abstained.

Article 24 paragraph (1), which says: "*In order to ensure prompt and effective action by the United Nations*, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security..." (emphasis added).

"The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter..." See Article 10 of the Charter.

reiterates that the proliferation of all weapons of mass destruction constitutes a threat to international peace and security...

And, ... recognises that the tests constitute a serious threat to global efforts towards nuclear non-proliferation and disarmament, urges India and Pakistan, and all other States that have not yet done so, to become Parties to the treaty on the Non-Proliferation of Nuclear Weapons and to Comprehensive Nuclear Test Ban Treaty without delay and without conditions.[175]

The fact that SC Resolutions are considered recommendatory, since t issue was taken up under Chapter VI of the Charter, does not exonerate t Security Council of its obligations under the Charter.[176] As the Indi Government made it clear, that the "attempts to coerce Member States to acce to international treaties is contrary to the norms of international law..." Even a party "exercising its national soverignty has the right to withdra from the Treaty if it decides that extraordinary events related to the subje matter of this Treaty, have jeopardized the supreme interests of i country..."[178] This point has been eloquently states in *S.S. Wimbledon* cas

...any convention creating an obligation...places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But, *the right of entering into international engagements is an attribute of state sovereignty.*[179]

And, state territorial sovereignty waş described by Max Hube Arbitrator in the *Island of Palmas Arbitration,* in these terms:

Sovereignty in the relation between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of State.[180]

According to Judge Gros, "to assert that a matter may have a dista repercussion on the maintenance of peace is not enough to turn th

175. SC Res. S/1172/1998, pp. 1-3.

176. "...the Security Council *shall* act in accordance with the Purpose and Principles the United Nations." See Article 24(2). The Purposes and Principles inter alia enjo it to observe the principles of "justice and international law", "sovereign equality all its member" and "good faith" to "fulfil obligations assumed in accordance wi the present Charter." (Emphasis added).

177. See the text of the response by the Indian Government to the Security Council Resolution of 5 June 1998. *The Hindu (*New Delhi), 7 June 1998, p. 1.

178. Article X(1) of the NPT.

179. *PCIJ, Series A, No. 1 (1923)*, p. 25 (emphasis added). What other right did the U Senate exercise in refusing to ratify the CTBT?

180. *AJIL*, vol. 2 (1928). p. 875.

urity Council into a world government."[181] India has raised several stions on the Security Council's resolution:

> Can the Security Council continue to ignore the overwhelming demand for elimination of nuclear weapons, which has been repeatedly endorsed by the General Assembiy; will be Council henceforth engage itself in matters relating to nuclear disarmament? if indeed the Charter of the United Nations envisaged any role for the Security Council on non-proliferation issues, which is doubtful, why has it not acted on the proliferation of tens of thousands of nuclear weapons since the United Nations was established? is the Security Council's concern on matters of proliferation limited to horizontal proliferation alone? is the continued retention of nuclear weapons by the nuclear-weapons States not considered a proliferation risk that threatens international peace and security? if nuclear tests are a threat to "non-proliferation and disarmament", or if the imputation is that tests raise tension, why did the Council not take cognizance of the over 2,000 tests carried out over the last 50 years, including as recently as 1996? can the Council call on a country not to assemble or develop nuclear devices, when this process continues in other countries, without the Council taking any notice? can the Council call on a country not to develop ballistic missiles, when it has made no such call to others, including to those who have several thousands of these weapons in their arsenals and continue to produce and develop them? on what basis is the Council limiting its concern on nuclear weapons to an arbitrarily defined geographical sub-region, when nuclear weapons by definition have a global reach and impact, and when the security concern of at least one of the countries it addresses extends well beyond that sub-region? on what basis can the Secretary-General report to the Council on the steps taken by the countries addressed by this resolution, when most of its provisions are *ultra vires* or at variance with international law and infringe on the sovereign prerogative of member States.[182]

istan was also dissatisfied with the Council's approach, but for ferent reasons. Ahmad Kamal, its Permanent Representative at the I. said:

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Dissenting Opinion in the *South West Africa (Namibia)* case, *ICJ Reports (1971)*, p. 331.

Letter to the Security Council President by India's Permanent Representative at the U.N. *The Hindu* (New Delhi), 7 June 1998, p. 1 (emphasis added).

> It is evident that by adopting this approach the Council is, in fact, acknowledging its failure to address the critical elements of the situation.[183]

While India described the resolution as "coercive", Pakistan wa the "failure" of the Council. But, the question is: "Are there any limit the Council's power of appreciation ... If there are any limits, what those limits and what body, if other than Security Council, is compe to say what those limits are".[184] In the *Expenses* case the Court observ

> In the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations ... As anticipated in 1945, therefore each organ must, in the first place at least, determine its own jurisdiction.[185]

Earlier, the South African and French Governments characterized *ul vires* the resolutions of the General Assembly which terminated t Mandate for South West Africa (Namibia). On a request by the Secur Council to the Court for an advisory opinion, the Court clarified:

> Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned.[186]

However, some judges expressed the opinion that the Court could ta note of any relevant issue of law and countenanced the thesis that t jural contents of the resolutions could be of relevance to the leg repercussions of South Africa's rejection of the resolutions.[187] At t same time:

> The political character of an organ cannot release it from the observance of the treaty provision established by the Charter when they constitute limitations on its powers or criteria for its judgement.[188]

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183. *Ibid.*
184. Dissenting Opinion of Judge Shahabuddeen in *Lockerbie* case, *ICJ Reports (199* p. 32.
185. *ICJ Reports (1962)*, p. 168.
186. Note 181, p. 45. See also, the Separate Opinions of Judges Ammoun, de Castro a Padilla Nervo, at pp. 71, 180-2 and 105 respectively.
187. *Ibid.*, the Seperate Opinions of Judges Petren, Onyeama and Dillard at pp. 130 14-5 and 151-2. See also, the Dissenting Opinions of Judges Fitzmaurice and G at pp. 301-4 and 331-2.
188. *Admissions* case, *ICJ Reports (1948)*, p. 64.

d, on this specific point, the World Court ruled in the *Nicaragua* case:

> In international law there are no rules: *other than such rules as may be accepted by the state concerned*, by treaty or otherwise, whereby the level of armaments of a sovereign state can be limited.[189]

The UN Charter is a treaty, albeit *primus inter pares* one; yet "the mbers of the UN are not "obliged to carry out all decisions of the curity Council. The meaning of Article 25 is that the members are eyed to carryout those decisions which the Security Council has taken accordance with the Charter".[190] As to rules which have been accepted herwise", this inquiry now turns to.[191]

### B. The Vienna Convention

*Odium tertii* stipulations in NACTs

The undertaking by nuclear-weapon states (NWS) not to assist non-clear weapon states (NNWS) under Article I is universal and applies h equal force to all states, whether or not they are partie to the NPT.[192] d, by virtue of Article IX paragraph (3) of the NPT, a NWS is one ich has manufactured and exploded a nuclear device prior to 1 uary 1967.[193] On 11 May 1995, the Treaty received its indefinite and

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. *ICJ Reports (1986)*, p. 135 (emphasis added).
. Kelsen, note 3, p. 3.
. Articles 35 and 37 paragraph (1) of the Vienna Convention. The provisions provide respectively: "An obligations arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing"; and, "when an obligation has arisen for a third state in conformity with article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third state, unless it is established that they had otherwise agreed".
. Mason Willrich, *Non-Proliferation Treaty: Framework for Nuclear Arms Control* (Charlottesville, 1969), p. 95. Article I of the NPT says: "Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive decices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices." See, note 171, pp. 111-2.
*Hearings on the Treaty on the Non-Proliferation of Nuclear Weapons Before the Senate Committee on Foreign Relations*, 90th Cong., 2nd Sess. (1968), p. 359. Adrian Fisher, the Deputy Director of the US Arms Control and Disarmament Agency (ACDA) confirmed that the definition would exclude any nation which acquires a nuclear capacity after the fixed date.

unconditional extension.[194]

The Comprehensive Test Ban Treaty (the CTBT)[195] was opened f signature on 24 September 1996. It will enter into force 180 days af the date of deposit of the instruments of ratification by all States listed Annex-2 to the Treaty.[196] And, if this has not entered into force thr years after the date of the anniversary of its opening for signatu Depository shall convene a Conference of the States that have alrea deposited their instruments of ratification upon the request of a majori of those States. That Conference shall examine the extent to which t requirement set out in paragraph (1) of Article XIV has been met a shall consider and decide by consensus what measures consistent wi international law may be undertaken to accelerate the ratification proce in order to facilitate the early entry into force of the Treaty.[197]

In 1959 the original parties[198] to the Antarctic Treaty guaranteed th "it is in the interest of all mankind that Antarctica shall continue forev to be used exclusively for peaceful purposes[199], and ... the continuan of international harmony in Antarctica will further the Purpose an Principles embodied in the Charter of the United Nations".[200] The Trea provided that any future international agreements relating to th use nuclear energy, including nuclear explosions and the disposal radioactive waste, to which they all become parties, would also apply Antarctica.[201]

Article I of the Outer Space Treaty of 1967[202] seeks to establish th the exploration and the use of outer space shall be "carried out for th

194. The decision was made pursuant to Article X paragraph (2) of the NPT. A Conferen was convened by the depositary governments in New York on 17 April 1995 to deci whether it should be extended for an additional fixed period or periods. On that d the conference took such a decision by consensus which was supported by the majori of the Parties to the Treaty. See *ILM*, vol. XXXIV (1995), pp. 961-74.

195. *ILM*, vol. XXXV (1996), p. 1427.

196. Significant among those include India, Israel and Pakistan, the so-called thresho states.

197. Article XIV of the Treaty. The vote on the General Assembly resolution that adopt the CTBT was 158 in favour, 3 against (Bhutan, India and Libya) and 5 abstentio (Cuba, Lebanon, Mauritius, Syria and the United Republic of Tanzania). UN DO A/Res/.50/245, 17 September 1996.

198. Argentina, Australia, Belgium, Chile, France, Japan, New Zelaland, Norway, Sou Africa, USSR, the UK and the USA.

199. Preamble of the Treaty, note 171, p. 22.

200. *Ibid.*

201. Article V paragraph (2).

202. Note 171, pp. 51-71.

efit and interests of all mankind". It therefore prohibits any nuclear vity in outer space.[203] Similarly, the Seabed Treaty of 1971 prohibits placement of nuclear weapons and other weapons of mass destruction the seabed and ocean floor and in the subsoil thereof.[204]

Essentially a nuclear weapon-free zone (NWFZ)[205] treaty, the aty of Tlatelolco, 1967[206] provides to come into force *inter alia* en all states outside Latin America which have *de facto* or *de* responsibility for territories within the "zone of application of Treaty" undertake to apply the Treaty to those territories;[207] en all states possessing nuclear weapons sign and ratify Protocol thereby undertaking to respect the "status of denuclearization" not to use or threaten to use nuclear weapons against any tracting state. Once these conditions have been satisfied, and treaty has entered into force for all the states in the zone, its eration may still be suspended if another state anywhere in the rld acquires nuclear weapons. It will remain suspended until that te ratifies Protocol II.[208]

The 1967 Treaty of Rarotonga[209] seeks to prohibit a very wide ctrum of nuclear activity in the South-Pacific, including the disposal nuclear waste, the supply of materials for the nuclear weapons industry

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. Article IV of the Treaty.
. Note 171, pp. 160-99.
. Article VII of the NPT recognizes the right of states to conclude regional treaties in order to ensure the absence of nuclear weapons from their territories. An *ad hoc* group was set up under the auspices of the Conference of the Committee on Disarmament (CCD) which recommended that obligations relating to the establishment of a nuclear weapon-free zone might be assured not only by groups of states constituting entire continents but also by smaller groups of states and even individual states. Some members of this group extending beyond the conventionally defined geographical limits of the states comprising NWFZs. But the experts admitted that such safety zones would have to be negotiated and agreed by third states if they were not to violate international law. See *Yearbook of the United Nations*, vol. 29 (1975), p. 90. See also David Freestone and Scott Davidson, "Nuclear Weapon-free zones", in Istvan Pogany, *Nuclear Weapons and International Law* (Aldershot, 1987), p. 178.
. Note 171, pp. 72-109.
This understanding is made by ratification of Protocol I. Note 171, pp. 89-90.
Article 28 paragraphs (1) (c) and (4). See also H. Gros Espiell, "The Non-Proliferation of Nuclear Weapons in Latin America", *International Atomic Energy Agency Bulletin*, vol. 22, no. 3/4 (1980) pp. 81-6; J.R. Martinez Cobo, "The Nuclear Weapon-Free Zone in Latin America, *International Atomic Energy Agency Bulletin*, vol. 24, no. 2 (1982), pp. 56-8, G. Descoigne, "An Overview of Nuclear-Weapon-Free Zones", *International Atomic Energy Agency Bulletin*, vol. 24, no. 2 (1984), pp. 50-5
Note 171, pp. 267-86.

as well as the testing, possession, control and presence of nuclea weapons. And, unlike the Tlatelolco Treaty, it does not permit explosion for "peaceful purposes".[210]

The parties to the 1995 Pelindaba Treaty[211] have determined to tak "all steps in achieving the ultimate goal of world entirely free of nuclea weapons, as well as of the obligations of all states to contribute to thi end.[212]

Rise of transnational coalitions—the so-called regimes exhibiting a new form of coordination and organization, emerged out of realism questioning the "importance of international law as a constraint on state behaviour",[213] has given a new turn to the issue of nuclear non-proliferation. The 12-member Missile Technology Control Regime of 1987 is a voluntary arrangement in which countries interested in restricting the proliferation of specific goods and technologies exchange information and coordinate their national activities.[214] It does not act as a decision-making authority; each member is responsible for implementing group decisions through national laws and regulations.[215] But, within the regime the members have developed common approaches to the issue of transfers of a specific list of controlled items. Two issues of the relationships between MTCR members and non-members are significant: first, the relationship with countries which have considerable ballistic missile-production capacities but are not members of the

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210. W.M. Sutherland, "The South Pacific Nuclear Free Zone Treaty", *International Journal of Estuarine and Coastal Law*, vol. 1 (1986), pp. 218-23; G. Fry, "Towards a South Pacific Nuclear Free Zone", *Bulletin of the Atomic Scientists*, June-July (1985), pp. 16-20.

211. African Nuclear-Weapon-Free Zone Treaty, *ILM*, vol. XXXV (1996), 635-50. See also Sola Ogunbanwo, "History of the Efforts to Establish an African Nuclear-Weapon-Free Zone", *Disarmament*, vol. XIX, No.1 (1996), pp. 13-20.

212. Preamble of the Treaty. *Ibid.*, p. 635.

213. Stephen Haggard and Beth A. Simmons, "Theories of international regimes", *International Organization*, vol. 41, No. 3 (1987), p. 491. For an excellent exposition on the subject, see Stephen Krasner (ed.), *International Regimes* (Illinois, 1983).

214. The MTCR restricts the proliferation of missiles, unmanned air vehicles and related technology for those systems capable of carrying a 500-kg payload to a distance of at least 300 km. But the Arms Control and Disarmament Agency (ACDA) of the US uses a wider formulation. In addition to the above, it restricts "systems intended for the delivery of weapons of mass destruction (WMD)". Besides missiles, this covers all systems designed and developed specifically for delivering nuclear, chemical or biological weapons. See *The Missile Technology Control Regime* (US Arms Control and Disarmament Agency: Washington, 1996).

215. *SIPRI Yearbook (1997)*, p. 354.

R;[216] and second, MTCR members' relations with countries which eveloping or buying ballistic missiles with focus on the Persian and South Asia.

t up in 1975, one of the key features of the Nuclear Suppliers p (NSG)[217] Guidelines[218] is the requirement for an agreement een the International Atomic Energy Agency (IAEA) and the ent state requiring the application of full-scope safeguards.[219] This even beyond the purview of the NPT inasmuch as these cover ers to all NNWS. These have been further tightened by the Warsaw lines issued in 1991.[220] The idea is to "strengthen the principles e MTCR and NSG] that can command universal adherence".[221]

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China and North Korea are prominent in this group. See W. Frieman, "New Members of the Club: Chinese participation in arms control regimes, 1980-95," *Non-proliferation Review*, vol. 3, no. 3 (1996), p. 20; Y. Sharov, "Ukraine and the MTCR", *The Monitor*, vol. 1, no. 2 (1995), p. 12.

"Is a forum for discussing and coordinating export control policies with a view to preventing the acquisition of nuclear weapons by non-nuclear weapons States. The members exchange information on nuclear programmes of potential concern from a proliferation perspective and issue Guideline following consultations among themselves". See, note 215, p. 349.

*for the Export of Nuclear Material, Equipment or Technology* (the so-called London Guidelines for Nuclear Transfers), INFCIRC/254/Rev.1/Part 1/Mod.3, November 1994. The three basic principles of these Guidelines are: that transfer of items on the trigger list should be authorized only after formal assurances from the governments of the rcipients which explicitly excludes uses which would result in a nuclear explosive device; materials and facilities appearing on the trigger list should be "placed under effective physical protection to prevent unauthorised use and handling"; and trigger list items should only be transferred when covered by appropriate IAEA safeguards. See paras. 2, 3 and 4.

Safeguards on all fissionable materials in its current and peaceful activities. See also R. Chidambaram and V. Ashok, "Embargo Regimes and Impact", in Deepa Ollapally and S. Rajagopal (eds.), *Nuclear Cooperation: Challenges and Prospects* (Banglore, 1997), pp. 57-64.

*Guidelines for Transfer of Nuclear Related Dual-Use Equipment - Material and Related Technology* (the Warsaw Guidelines), IAEA Document INFCIRC/254/Rev.1/part 2, July 1992. Now there are several other factors taken into account before effecting such transfers, such as first whether the state is a party to the NPT, Tlatelolco Treaty or similar nuclear non-proliferation agreements with an agreement on IAEA safeguards on all peaceful nuclear activities; second, if not a party to any such international agreement, whether facilities associated with nuclear fuel cycle activity are not or will not be subject to safeguards; third, whether items are appropriate for the end-use and whether this stated use is considered appropriate for the end user; fourth, whether the item is to be used in a reprocessing or enrichment facility; and finally, demonstrated support for nuclear non-proliferation by the recipient and compliance with existing obligations in this area.

President William Jefferson Clinton, "Confronting the challenges of a broader world", *US Department of State Dispatch*, vol. 4, no. 39, 27 September 1993.

*(ii) Scope of obligations*

The hypothetical loophole[222] in the NPT became a reality on 11 
1998 when India, hitherto a non-party NNWS, initiated a series of nuc
tests completed two days later. In a statement to the Parliament on
May 1998, the Indian Prime Minister Atal Bihari Vajpayee declared

> India is now a nuclear weapon state. This is a reality that cannot be denied. It is not a conferment that we seek, nor is it a status for others to grant. It is an endowment to the nation by our scientists and engineers. It is India's due, the right of one-sixth of human kind.[223]

Pakistan followed suit on 29 May 1998. Speaking "authoritatively" behalf of the Government of Pakistan, the Foreign Secretary announc on 30 May 1998:

> The devices [Nuclear] tested correspond to weapon configuration compatible with delivery systems.[224]

Later, the Foreign Minister confirmed that the Ghauri missile "w be armed with nuclear warheads".[225]

The Joint Communique on Indian and Pakistani Nuclear Tests Five Permanent Members of Security Council, released on 5 June 199 said:

> [T]he international non-proliferation regime must remain strong and effective despite the recent nuclear tests in South Asia... Notwithstanding their recent nuclear tests, India and Pakistan do not have the status of nuclear weapons states in accordance with the NPT... strongly believe that India and Pakistan should adhere to the Comprehensive Nuclear Test Ban Treaty immediately and unconditionally... [226]

The US response was even more explicit:

> According to international law, a nuclear state by definition must have detonated a nuclear device before 1968...[227]

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222. A strict interpretation of Article IX paragraph (3) would exclude the new nucle state from the difinition of NWS under the NPT. Note 171, p. 115.
223. *The HIndu*, 28 May 1998, p. 9.
224. *The Hindu*, 31 May 1998, p. 1
225. *Ibid.*
226. *Press Release SC/6527*, 5 June 1998, pp. 1-2.
227. *The Hindu*, 17 May 1998, p. 1.

he US continued:

> this case India would be considered as a non-nuclear weapon ate based on its status under the nuclear Non-Proliferation reaty... [228]

nternational law does not define a nuclear weapons state... a state has nuclear weapons is a nuclear weapon state. To determine the of a nuclear weapon state, one does not need to await a recognition ch by the Parties to the NPT, or by the P-5 of the UN Security cil".[229] Whether non-proliferation has become a norm of ational law, as feared by some,[230] will be tested later in this paper, umulative effect of the international response[231] has been to place under the obligation of Article II[232] as there is no third category of in the NPT. However, being a non-party it is not bound by it.[233]

nother significant implication is that a nuclear state which is not an under the NPT would be precluded from qualifying, under the US ic Energy Act, for assistance in the design, development and cation of atomic weapons.[234]

addition, there are other significant stipulations envisaging ations on non-parties. There is link, albeit a tenuous one, between PT and the CTBT and "Article VI and the Preamble of the PTBT to this".[235] And interestingly, both India and Pakistan are parties to

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*bid.*, 12 May 1998, p. 1.
V.S. Mani, "India's tests: the legal issues", *The Hindu*, 5 June 1998, p. 10.
Muchkund Dubey, "World Nuclear Order and India", *The Hindu*, 27 May 1998, p. 10; see also Achin Vanaik, "Sign the CTBT", *Ibid.*, 29 June 1998, p. 10, and B. Vivekanandan, "Recognition, a Prerequisite," *The Hindu*, 28 December 1999, p. 21.
'... I, for one, cannot and will not agree to any treaty which would legitimize de facto India's possession of these weapons ...," said Senator Jesse Helms, the Chairman of the US Senate Foreign Relations Committee. See *The Hindu*, 15 May 1998, p. 12.
'... not to manufacture nuclear weapons or other nuclear explosive devices..." See Note 171, p. 112.
Article 35 of the Vienna Convention.
"When India demands a recognition of its status as a nuclear weapons power, it is not seeking a *de jure* membership of the NPT System. It wants a de facto acknowledgement by a lifting of the long standing civilian technology blockade imposed by the great powers against it over the last quarter of a century in the name of non-prolifertion". C. Raja Mohan, "Rethinking the CTBT", *The Hindu*, 26 May 1998, p. 12.
T.T. Poulose, *The CTBT and the Rise of Nuclear Nationalism in India — Linkage between Nuclear Arms Race, Arms Control and Disarmament* (New Delhi, 1996), p. 180. Preamble of the PTBT principally aims to "put an end to the armaments race and eliminate the incentive to the production and testing of all kinds of weapons,

the PTBT but that is not sufficient for Article XIV[236] of the CTB survive the test of Article 52 of the Vienna Convention.[237]

Obligations *erga omnes* flowing from treaties creating internatio recognized status, such as the Treaty of Tlatelolco, require states this case those who have emerged as nuclear-weapon states—to obs the sanctity of those regimes. The operation of oligopolistic we material and delivery system certainly affect the interests of members, in particular of target states,[238] but international law does obligate non-members to observe the guidelines of the MTCR and the N

*C. Customary Law*

The main question is whether the recent nuclear tests by India b the international *norm*[239] against nuclear test established by the CT Whether the twenty-four-year long moratorium on nuclear testing refl India's acquiescence in the existing regime of non-proliferatio whether its refusal to sign the NPT as well as the CTBT confirms

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including nuclear weapons", and seeks "to achieve the discontinuance of al explosions of nuclear weapons for all time, determined to continue negotiatio this end", and desire "to put an end to the contamination of man's environme radiocative substances". See note 171, p. 33. Article VI of the NPT provides: " of the Parties to the Treaty undertakes to pursue negotiations in good faith on effe measures relating to cessation of the nuclear arms race at an early date and to nu disarmament, and on a treaty on general and complete disarmament under stric effective international control". *Ibid.*, p. 114.

236. Note 197 and the accompanying text.

237. "A treaty is void if its conclusion has been procured by the threat or use of in violation of the principles of international law embodied in the Charter of the U nations". See also note 176; A.G. Noorani, "EIF in CTBT-II: Violation of Vi Convention", *The Statesman* (New Delhi), 8 August 1996, p. 8; V.S. Mani, "C the EIF provisions", *The Hindu*, 15 August 1996, p. 10; M.K. Nawaz, "Pros for the Entry into Force of the CTBT", *IJIL*, vol. 37, no. 1 (1997), pp. 23 Arundhati Ghose, "Negotiating the CTBT: India's Security Concern and Nu Disarmament", *Journal of International Affairs*, vol. 51, no. 1(1997), pp. 239- and John D. Holum, "The CTBT and Nuclear Disarmament — The U.S. View", pp. 263-81.

238. See Statement by R.L. Bhatia, Indian Minister of State for External Affairs, i First Committee of the 49th UN General Assembly at New York on 24 October *Statements by India on CTBT*, 1993-1996 (Ministry of External Affairs, p. 30.

239. The conference on Disarmament (CD) on 14 May said that Indian nuclear tests "b the international *norm* against test explosion established by the 1996 CTBT nego at the Conference" (emphases added). *UN Newsletter*, vol. 53, No. 21, 23 May "Such testing was contrary to the de facto moratorium on the test of nu weapons..." See *Press Release* SC/6517, 14 May 1998, p. 1. "Even though the C is yet to enter into force, they [the P-5] regard it as having established an interna norm against testing", Dubey note 230, p. 10.

ia has been an objector? Where does the *opinio juris* lie? Though it is always easy to discern evidence of its existence, more so in relation NACTs, such as the NPT and the CTBT, a further analysis may shed ne light on this aspect. To this end, the Indian[240] practice is considered three levels[241]: Indian practice prior to the conclusion of the NPT, m NPT to Pokharan-I[242] and from Pokharan-I to Pokharan-II.[243]

*Indian Practice Prior to the NPT*

In a statement in the Lok Sabha (Lower House of Parliament) on 2 ril 1954, Prime Minister Jawaharlal Nehru declared:

> We have maintained that nuclear (including thermoneculear), chemical and biological (bacterial) knowledge and power should not be used to forge these weapons of mass destruction. We have advocated the prohibition of such weapons, by common consent

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0. The Joint Communiqué on Indian And Pakistani Nuclear Tests By Five Permanent Members of Security Council issued on 5 June 1998 makes a distinction between the Indian practice vis-à-vis the practice of other non-parties and, in particular, the practice of Pakistan which until 4 July 1998 remained essentially Indo-centric and unlike India, not opposed to the NPT per se. The Communiqué brings home this point very clearly: "... the grave situation created by the nuclear tests carried out in May by India and *then* by Pakistan", note 226, p. 1 (emphasis added). Israel's refusal to sign the NPT predicated on the consideration "that until there was conclusive evidence that the Arab states had reconciled themselves to Israel's existence"... it must continue "deterrence through uncertainty".. "from its ambiguous nuclear posture". Shai Feldman, "Israel", in Mitchell Reiss and Robert S. Litwak (eds.), *Nuclear Proliferation after the Cold War* (New York, 1994), p. 70. In addition, it was India which initiated testing not only this time but also in 1974. See also, K. Subrahmanyam (ed.), *Nuclear Proliferation and International Security* (New Delhi, 1985), Zia Mian, *Pakistan's Atomic Bomb and Search For Security* (London, 1995), pp. 12-5.

1. The treaty "rule must be sufficiently significant to be of a fundamentally norm creating character, the rule must be of a potentially norm creating character with respect to precision as to its meaning and scope, state practice constituting the subject matter of the rule should be extensive and virtually uniform, the passage of a considerable period of time is not necessary provided there is widespread and representative participation in the observance of the rule particularly among States having a direct interest in the issue, the States that adopt the practice constituting the rule must do so because they feel legally compelled to comply, the states that observe the rule because they feel legally compelled to do so, must believe themselves to be bound by a custom as representing law, not merely by treating obligation, and the treaty embodying the rule in question must have been since its inception, declaratory of a then existing rule of customary international law..." See the *North-Sea Continental Shelf cases, ICJ Reports (1969)*, pp. 41-5.

2. First nuclear device exploded by India on 18 May 1974 at Pokharan (Rajasthan).

3. Nuclear tests of 11 and 13 May 1998.

> and immediately by agreement amongst those concerned ... The Government would consider, among the steps to be taken now and forthwith, the following: 1. Some sort of what may be called "standstill agreement"... A. Immediate (and continuing) private meetings of the sub-committees of the Disarmament Commission to consider the "standstill" proposal...
>
> The Government of India will use its best efforts in pursuit of these objectives.[244]

V.K. Krishna Menon said:

> The bomb has no value; it has not even a deterrent value ... our efforts should not be in building another bomb but in trying to rid the world of the bomb. What power would we have to say that nuclear weapons should be banned if we are building one ourselves?... I refuse to believe that complete disarmament is utopian.[245]

In 1965, India put forward the idea of an international non-proliferatio treaty which would obligate NWS to abandon their nuclear stockpile should other countries refrained from developing or acquiring thes weapons. But,

> This balance of rights and obligations was not accepted ... As a result we made it clear that we would not be able to sign the NPT.[246]

*(ii) From the NPT to Pokharan-I*

On 5 April 1968 the then Indian Prime Minister Indira Gandh declared in the Lok Sabha:

> we shall be guided entirely by our self-enlightenment and the considerations of national security.[247]

The NPT, which was opened for signature on 1 July 1968, came int force on 5 March 1970. In the next four years India neither acceded t the Treaty nor did anything prohibited by the Treaty. Does this indicat

244. *Jawaharlal Nehru Speeches, 1953-1957* (New Delhi, 1960), pp. 248-50.
245. Michael Brecher, *India and world Affairs: Krishna Menon's View of the World* (Ne Delhi, 1968), pp. 228-32.
246. Note 223, *ibid.*
247. *Ibid.*

ıcurrence in the emerging "norm" of non-proliferation despite the hat India refused to sign the treaty even as a NNWS and that peaceful ear programme was permitted in accordance with a safeguard ement concluded with the International Atomic Energy Agency A)?[248] Or, does this amount to an objection since India's refusal to the Treaty showed that, though it refrained from performing a test, d not abandon the prospective intention of doing so. Further, the hat peaceful nuclear activity was permitted for NNWS parties carried a's intention further that the impending explosion might not be ed to peaceful purposes only.[249]

)n 18 May 1974, India successfully carried out an underground ear explosion. The Atomic Energy Commission of India described "a peaceful nuclear explosion experiment using an implosion device. art of the programme of study of peaceful use of nuclear explosions, Government of India has undertaken a programme to keep itself ast of developments in this technology, particularly with reference s use in the field of mining and earth moving operations".[250] Prime ster Indira Gandhi said:

> ve do not intend to use the knowledge of this power for any other than peaceful purposes and our neighbour need have no ear.[251]

the Foreign Minister clarified:

> Ve have no intention of developing nuclear weapons.[252]

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Articles III and IV of the NPT. The first provides: (1) "Each non-nuclear weapon State party to the Treaty undertakes to accept safeguards, as set forth in an agreement to be negotiated and concluded with the International Atomic Energy Agency in accordance with the Statute of the International Atomic Energy Agency..." (3) "The safeguards required by this Article shall be implemented in a manner designed to comply with Article IV of this Treaty ..." Article IV says: "Nothing in this Treaty shall be interpreted as affecting the inalienable right of all the Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes without discrimintion and in conformity with Articles I and II of this Treaty". Articles I and II respectively refer to non-transfer by the NWS and non-receipt by the NNWS of any nuclear weapon or other nuclear explosive devices. Note 192, pp. 112-4.

Krishna Menon said: "There can be no green bombs inasmuch as there can be no vegetarian tigers." Quoted from Mani, note 229, *ibid.*

*SIPRI Yearbook (1975)*, p. 16.

*Ibid.*

*Ibid.*

*(iii) From Pokharan-I to Pokharan-II*

During the span of twenty-four years which elapsed since I exploded its first nuclear device on 18 May 1974, profound cha have taken place in the international scenario significant among t include: indefinite extension of the NPT in 1995; Advisory Opinio the International Court of Justice on the legality of the threat or us nuclear weapons in 1996; and the conclusion of a CTBT in 1996.

Two questions may be raised here: first, whether twenty-four y of self-imposed moratorium on nuclear testing evidences the *opinio j* in favour of nuclear non-proliferation and test-ban. In other words, India acquiesced in the existing regime of nuclear non-proliferation test-ban.[253] Second, whether refusal to accede to the NPT and sign CTBT testify against the existence of such an *opinio juris*. In other wo can Indian practice during the interregnum be termed as one of persis objection against both the existence of a norm of nuclear n proliferation and test-ban. Let us now briefly look at how does t practice translate in terms of international law precepts govern obligations.

The then Indian Prime Minister Rajiv Gandhi said at the UN Spec Session on Disarmament on 9 June 1988:

> Deterrence needs an enemy, even if one has to be invented. Nuclear deterrence is the ultimate expression of the philosophy of terrorism holding humanity hostage to the presumed security needs of the few.[254]

The Indian Memorial submitted to the World Court in 1995 stated:

> Nuclear deterrence had been considered to be abhorrent to human sentiment since it implies that a state if required to defend its own existence will act with pitiless disregard for the consequences to its own and adversary's people... A better and saner way to secure everlasting peace would be to ensure that not only are such weapons never used but also not made... if peace is the ultimate objective there can be no doubt that disarmament must be given priority and has to take precedence over deterrence... if

253. I.K. Gujaral is reported to have said: "It [India] has scrupulously observed provisions of the NPT even while remaining out of it". *World Focus*, vol. 18, 3 (1997), p. 23.

254. *Final Report of the Global Security Project, Global Security Programme*, Rajiv Gan Institute of Contemporary Studies (New Delhi), No. 4, p. 45. See also, Ziba Mosha *Nuclear Weapons Proliferation in the Indian Subcontinent* (London, 19 p. 10-4.

the use of such weapons itself is *illegal under international law then their production and manufacture cannot under any circumstances* be considered as permitted... Violation of international law like any law would only highlight the importance of complying with such law and do not make legal what is otherwise illegal.[255]

dian Prime Minister Atal Bihari Vajpayee said following Pokharan-II:

... The series of tests recently undertaken by India have led to the removal of doubts. The action involved was balance in that it was the minimum necessary to maintain what is an irreducible component of our national security calculus...[256]

rlier, the Indian Foreign Secretary stated in the plenary of the onference on Disarmament at Geneva on 21 March 1996:

... India's objectives are different. We do not believe that the acquisition of nuclear weapons is essential for national security, and we have followed a conscious decision in this regard...[257]

ne inconsistencies in the statements of Indian leaders and officials seem elude an infallible evidence of concretization of an *opinio juris* cessary to crystallize the Indian practice either as one of conclusive quiescence in or of persistent objection to the putative norm of nuclear on-prliferation and test-ban. However, insofar as the policy of deterrence concerned, the ICJ held in its Advisory Opinion of 8 July 1996:

... the Court cannot lose sight of the fundamental right of every State of survival, and thus its right to resort to self-defence in accordance with Article 51 of the Charter when its survival is at stake. Nor can it ignore the practice referred to as "policy of deterrence," to which an appreciable section of the international community adhered for many years...[258]

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5. *IJIL*, vol. 37, No. 1 (1997), pp. 147-8 (emphasis added).
6. *The Hindu*, 28 May 1998, p. 9.
7. Note 238, p. 98.
8. *ILM*, vol XXXV, no. 4 (1996), p. 830. It may be of some significance that the Court's pronouncement of the Advisory Opinion preceded the adoption of the CTBT by the General Assembly on 10 September 1996. And the request for an Advisory Opinion was made by the General Assembly resolution of 15 December 1994 before the NPT was indefinitely extended on 11 May 1995. See also the Declaration of Judge Shi, *ibid.*, p. 832.

Instances of inconsistent Indian practice attended with unilatera declarations tend to mollify the rigour of its objection to the putative norm of nuclear non-proliferation and test-ban, the Court found the number of ratifications "though respectable, hardly sufficient"[259] for the NPT as creative of such a norm binding non-parties.

As regards the CTBT:

> the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law... an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of states whose interests are specially affected, should have been *both extensive and virtually uniform...*[260]

But the inconsistencies in Indian practice are not wholly without legal consequence.

### D. Estoppel and Good Faith

The doctrine of estoppel[261] based on the general principal of good faith[262] requires, in essence, "that a state ought to be consistent in its attitude to a given factual or legal situation". [263] The principle of good faith now warrants India to adhere to its statements whether it be true or not and it is the principle of good faith which debars it by way of an

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259. Note 241, p. 43.

260. *Ibid.*

261. See *Arbitral Award by the King of Spain, ICJ Reports (1960)*, p. 213; *Temple of Preah Vihear, ICJ Reports (1962)*, p. 32.

262. See Article 2 paragraph (2) of the Charter. The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the Untied Nations, provides inter alia, that: "Every State has the duty to fulfil in good faith its obligations under the generally recognized principles and rules of international law". See *ILM*, vol. IX (1970), p. 1292. The ICJ has emphasized that the principle of good faith is one of the basic principles governing the creation and performance of legal obligations but not in itself a source of obligation where none would otherwise exist. See *Border and Transborder Armed Actions* case, *ICJ Reports (1988)*, p. 105. See also, Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law", *BYIL*, vol. XXX (1953), pp. 53-4; *Ibid.* (1959), pp. 207-16; Georg Schwarzenberger, "The Fundamental Principles of International Law", *RADI*, vol. 87 (1955)-I, pp. 290-326; Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London, 1953), pp. 105-60; Shabtai Rosenne, *Developments in the Law of Treaties 1945-1988* (The Hauge, 1989), pp. 135-79; V.S. Mani, *Basic Principles of Modern International Law* (New Delhi, 1993), pp. 195-214.

263. MacGibbon, "Estoppel in International Law", *ICLQ*, vol. 7 (1958), p. 468.

itable estoppel:[264]

> A policy of deterrence borders on a policy of threat of use of force. A threat of use of force is forbidden under the modern international law—50 years of Indian foreign policy have contributed to this perspective of international law in no small measure. It is ironic that all the above legal postulates were sharply articulated by India in its Written pleadings before the ICJ in 1995. India is now estopped from making a volte-face.[265]

But equity[266] is the genus of which estoppel is a species. It is a legal cept being "a direct emanation from the idea of justice".[267] It follows, refore, that "a rule of law, if not actually embodying equitable nciples, may require their application".[268] Hudson observed:

> This long and continuous association of equity with the law which is applicable by international tribunals would seem to warrant a conclusion that equity is an element of international law itself.[269]

us, equity forms part of international law.[270] The characterization as eshold states of three principal non-parties to the NPT by definition ant acknowledgement of their nuclear status. Hence, it fell on parties the Treaty to formalize their status as part of their obligation under icle VI which would in turn obligate them under the same provision.[271] iission to do this indicates the breach of good faith under Article VI, l indefinite extention of the NPT confirms its perpetuation and cannot redeemed except by way of an ultra vires, by a mandate[272] of the

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. "... but equity in this connexion denotes, not a departure from established rules of international law, but the basis of good faith upon which so many of those substantive rules exist". See Bowett, "Estoppel Before International Tribunals And Its Relations to Acquiescence", *BYIL*, vol. XXXIII (1957), p. 176.

. Mani, note 229, *ibid.*

. Wilfred Jenks, *Proper Law of International Organisations* (London, 1962), pp. 102-14.

. *Tunisia - Libya Continental Shelf case, ICJ Reports (1982)*, p. 60.

. R. Y. Jennings and Arthur Watts, *Oppenheim's International Law*, vol. I. Part 1 (London, 1992), p. 44.

. *Permanent Court* (New York, 1943), p. 617.

. *Rann of Kutch Arbitration, International Law Reports*, vol. 50 (1968), p. 2.

. See dispositif 2F, note 258, p. 831. Various attempts have been made by the Government to get India recognized as a nuclear weapon state. Muchkund Dubey, India's Pursuit of a Minimun Nuclear Deterrence", *World Focus*, vol. 20, No. 8 (1999), p. 11. After the tests, India stated that it will henceforth observe a voluntary moratorium and refrain from conducting underground nuclear test explosion. It has also indicated a willingness to move toward a de jure formalization of this declaration. See Jaswant Singh, "Against Nuclear Apartheid", *Foreign Affairs*, vol. 77, No. 5 (1998), p. 51.

Note 226, *ibid.*

Security Council — an organ itself mandated to act in accordance wit "justice and international law."[273]

### E. Juristic Opinion

The writings of publicists seem to revive, in some measure, th inherent tension between positive and natural law as to the basis o obligation. Some say that the inherent rationality of law "cannot tolerat an interpretation which negates its very essence."[274] Those who subscrib to the widely accepted notion that international law "is indeed a bindin system of a rule of law"[275] argue that "not being a party to the NPT o the CTBT India is not legally forbidden from developing nuclea weapons".[276] There are others who think that disarmament treatie "represent a category of treaties which are of particular importance t the State, since they deal with the basic security aspects of States ultimately with the very existence of the State",[277] and therefore, "th law of treaties must be as precise as possible in order to ensure as high a degree of predictability and certainty of interpretation and applicatio as can be achieved".[278] The view lends credence to the "extreme difficulty"[279] to discern evidence of an *opinio juris* as contemplated by Article 38 of the Vienna Convention. The number of ratifications[280] may in one way evidence its inadequacy to address situations, such as besets the present one, though the contrary is not always untrue.[281]

273. Articles 24 paragraph (2) and 1 paragraph (1). See also C. Raja Mohan, "The art of the nuclear deal", *The Hindu*, 9 July 1998, p. 10; "The nature of the Security Council does not confer upon its recommendatory acts legal effects of *res judicata*", see Dissenting Opinion of Judge Ranjeva in the *Lockerbie* case, *ICJ Reports (1992)*, p. 73.

274. B.S. Chimni, cited from Dissenting Opinion of Judge Weeramantry, note 258, p. 912. "There is an important body of rules which regulate state behaviour in international relations and which do not fall within the category of legal rules". See Michael Bothe, "Legal and non-legal norms — a meaningful distinction in international relations?" *Netherlands Yearbook of International Law*, vol. 11 (1980), p. 93.

275. Mani, "On international law", *Seminar*, vol. 433, October (1995), p. 4.

276. Mani, note 229, *ibid.*

277. Goran Lysen, "The Adequacy of the Law of Treaties to Arms Control Agreements", in Julie Dahlitz (ed.), *Avoidance and Settlement of Arms Control Disputes, Arms Control and Disarmament Law*, (United Nations, 1994) vol. II, p. 123. See also the dispositif 2E of the Advisory Opinion, note 258, p. 831.

278. *Ibid.*

279. Dissenting Opinion of Judge Tanaka, note 241, p. 176.

280. Only two permanent members of the Security Council (the UK and Russia) are parties to it. China, France, the USA, Germany and Italy are non-parties.

281. "There is something inherently wrong with sanctioning a democracy legally acting in its perceived national interest while rewarding a single party communist state which threatens regional security in violation of international law". Senator Connie Mack questioning the Clinton administration's policies towards China and India. *The Hindu*, 18 June 1998, p. 8.

centralized structure of international law reflects "the chasm en the idea and real".[282] It does not always have "a clear and c legal rule readily applicable to every international situation"[283] s development "has always been a process of applying ... ished legal principles to circumstances not previously ntered".[284] As to the basis of binding nature of international law, bate is more pronounced among positivists[285] inter se, and seems apparent than real.[286]

car Schachter argues "The rules against aggression and on self-e are not just another set of international rules. They have a higher ativity", a recognized claim to compliance that is different from the of international law rules".[287] The consequences of this reasoning difficult to discern. "There is a clear tendency in the jurisprudence ICJ as well as in the practice of the political organs of the United ns to consider certain treaties as producing effects also for those hitherto have not ratified them".[288] Judge Lachs in his Dissenting on in the *North Sea Continental Shelf* cases admitted that not only provisional international instruments, like unratifed treaties, give general rules of international law but that:

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Mani, note 275, *ibid.*

Note 268, pp. 12-3.

Oil Fields of Texas Inc. v. *Iran, International Law Reports*, vol. 69 (1982), p. 594.

Roberto Ago, "Positive Law and International Law", *AJIL*, vol. 51 (1957), p. 698; .L. Brierly, *The Basis of Obligation in International Law* (London, 1958), pp. 250-4; H.L.A. Hart, *The Concept of Law* (Oxford, 1961), Chapter 10; P.E. Corbett, *Morals, Law and Power in International Relations* (Princeton, 1956), p. 10-2; W. Friedman, *The Changing Structure of International Law* (Columbia, 1964), p. 9; Wilfred C. Jenks, *A New World of Law?* (London, 1969), pp. 219-66; Richard A Falk, *Legal Order in a Violent World* (Princeton, 1970), pp. 39-42.

Higgins, note 148, *ibid.*

Entangled Treaty and Custom", in Yoram Dinstein (ed.), *International Law at a Time of Perplexity: Essays in Honour of Shabati Rosenne* (The Hague, 1989), p. 34. The Court too has said: "There is a specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law". *Nicaragua* v. *U.S. (Merits), ICJ Reports (1986)*, p. 94.

Christian Tomuschat, "Obligations Arising for States without or Against Their Will", *RADI*, vol. 241 (1993) IV, pp. 268-73, See also D'Amato, "Trashing Customary International Law", *AJIL*, vol. 81 (1987), p. 102; Thomas M. Franck, "Some Observations on the ICJ's Procedural and Substantive Innovations", *ibid.*, pp. 118-; Frederick L. Kirgis, "Custom on a Sliding Scale", *ibid.*, p. 146; Gennady M. Danilenko, *Law-Making in the International Community* (The Hague, 1993), pp. 67-, Martti Koskenniemi, "The Politics of International Law", *European Journal of International Law*, vol. 1 (1990), p. 27; Thirlway, *International Customary Law and Codification* (London, 1972), p. 81; and General Assembly resolution 2625 (XXV) f 24 October 1970.

treaties binding many States are, *a fortiori* capable of producing this effect, a phenomenon not unknown in international relations.[289]

It appears therefore that "treaties can be made opposable to a t party, by specific acceptance of their contents ... unilateral acts may the source of an obligation undertaken but not of the norm which ther becomes opposable".[290] There remains "a wide range of views on basis of obligation — natural law, consent, principles anterior to legal system itself, consensus reciprocity — it is interesting that they exclude imposed obligation by the enforcement of sanctions".[291]

## IV. CONCLUDING OBSERVATIONS

The enquiry reaffirms that the Charter of the United Nations inve the Organization with a very wide latitude of powers necessary maintain international peace and security. The Charter entrusts the powers primarily with the Security Council, to be exercised accordance with the Purposes and Principles, in particular, the principl of justice and international law. But, unlike the legal systems of stat there is no procedure in the scheme of the United Nations for determini the validity of acts of its organs. Similarly, there is no body external the Security Council to determine the *vires* of a situation constituting threat to international peace and security. And realism dictates that determination to this effect for non-adherence to a treaty, even pursuant to the Chapter VI, acquires significance — when repeat refusals to honour the urges of the Organization may potentially employed as a conduit to the Chapter VII, to effect an eventu determination for enforcement action. However, unilateral sanctio

289. Note 241, p. 225. Tomuschat lists in this category treaties with "generalizabl provisions, treaties protecting basic interests of the international community, trea mechanisms focused on non-party States, and action by the Security Council. No 288, p. 273.

290. Tomuschat, note 288, p. 73.

291. Higgins, note 148, p. 41; See also in this context, Articles 2 paragraphs (1) and ( of the UN Charter. At the conclusion of the first meeting of the Security Coun held at the level of Heads of State and Government on 31 January 1992 a stateme was issued that seems outright to challenge the notion of sovereign freedom wi regard to national defence: "The members of the Security Council underlie the ne for all Member States to fulfil their obligations in relation to arms control a disarmament; to prevent the proliferation in all its aspects of all weapons of ma destruction; to avoid execssive and destabilizing accumulations and transfers of arn and to resolve peacefully in accordance with the Charter any problems concerni these matters threatening or disrupting the maintenance of regional and global stabilit UN Doc. S/23500, 31 January 1992, p. 4.

osed by some of the Members of the Security Council cannot timize acts otherwise impermissible under international law and rob es of their sovereign prerogative to enter into treaty relations. The age between disarmament and development, now being coercively etuated by some of the parties to the nuclear regime to tighten ditionalities for aid and transfer of technology, does in no way gate the non-parties as a matter of law—as forming a kind of *tertium d*.

The 1969 Vienna Convention instances the consensual basis of the ling nature of international law. Consent, the Convention shows, is erally express, though a few provisions contemplate its implied ant. Attempts to deduce obligations out of the latter have generated e heat than light, and the jurisprudence of the International Court of ice has admitted the extreme difficulty that surrounds its infallible ermination. The controversy attained its apogee with attempts to ose obligations on non-parties to the NPT and the CTBT. Even when parties to a treaty are free to repudiate binding obligations in case of eat to their supreme national interests, it becomes difficult to nprehend how the same logic would obligate those states who not y have never consented but have always questioned the purported on d' être of those treaties. A treaty so opposed can never generate a ding norm of customary law and attempts to assert the contrary mplify, rather than execrate, the existence of such a rule.

To Falk's aphorism that "the image of law is tarnished less by conduct n by callous style of justification",[292] must be added that the insatiable st for security has been the perennial refuge for such a recourse. The nbership of international society evidences the recognition of limited ereignty by states, and the existence of law predicates the continuing d for a modicum of stability and a semblance of predictability in the tudes of states externalized by their conduct in the space they hold in nmon with others. Woven with moral fibre, equity in a more strictly al sense would preclude a non-party from averring the truth in a prior *motu* assertion, and when forming a necessary part of the principle good faith embodied in a treaty obligation, such as Article VI of the T, would desist the parties from perpetuating, despite protests, an *um tertii*. Far from creating obligations on non-parties qua Treaty, such as these, militate against the spirit of peremptoriness underlying norms of *jus cogens*.

An enquiry such as this often slips into a doctrinal debate that erlines the basis of obligation. Though primarily a debate amongst

Note 146, p. 361.

positivists inter se, who concede albeit grudgingly, the difficulty inherer in the application of their theory — particularly the one which insists o "tacit" consent in situations where the "express" variant is impossible t locate with ease; the revival of the theory of natural law in the twentiet century and its seminal role in the development of humanitarian law le the jurists to argue on the basis of inherent rationality of law, had mad the debate pronounced and multipolar. We have, in consequence, plurality of juristic opinion ranging from those who admit no obligation on non-parties to a treaty because there is no consent to be found, t those who assert that there are treaties of generalizable provisions, suc as the NPT and the CTBT, which presage higher norms of complianc and states can be forced even against their will. In between, some poin out that certain rules in international society which regulate the behaviou of states are not even "legal rules". There are others who argue tha inherent rationality of law predicates survival and nuclear weapons eliminate such a hope. No right thus can be legally protected in respect of these weapons, but every obligation must be legally enforced for their total elimination and, for this reason, the distinction between parties and non-parties becomes superfluous. And, finally, there are others who doubt the adequacy of the Vienna Convention since the issue impinges on the survival of state and hence no question of obligation.

In all, the *pacta tertiis* rule explains the esoteric legality, but fails to address the emergent reality. Rights of subjects in a legal community with no effective remedy in case of violation, suggests elementary jurisprudence, are but imperfect rights and apply *pari passu* to states in the international community and, to this extent, eclipse the notional rigour of *pacta tertiis*... Realities inexplicable in jural semantics do not predicate "obligations" so to say, but they do often incur for their subjects something of the same measure, if not more, consequences of which elude definite juridical nomenclature. Sovereign states must learn to confront the reality of a world, so small and too fragile, and embrace the limitations of law to be the sole sentinel in every case.

# NOTES AND COMMENTS

# TERNATIONAL HUMAN RIGHTS REGIME AND TATES OF EMERGENCY : NEED FOR REFORM

MANOJ KUMAR SINHA*

## I. INTRODUCTION

the past fifty years, the community of nations has produced a r of international human rights instruments both at the universal e regional levels, which are designed to secure the promotion and ion of human rights and fundamental freedoms. In this direction, ost important milestone was the adoption of the Universal ation of Human Rights (hereinafter referred to as UDHR) in 1948.[1] in its fifty years of existence become part of customary tional law as also of general principles of law recognized by States. ver, it was thought at the time of drafting .of the UDHR that it not create legally binding obligations on states parties. So, it was d that the Commission on Human Rights (CHR) of the Economic ocial Council[2] should undertake the drafting of legally binding rights instruments based on the principles embodied in UDHR. utcome of this effort resulted in two separate human rights nents[3] adopted in 1966, one on the Economic, Social and Cultural (ICESCR), and the other dealing the Civil and Political Rights after referred to as ICCPR). There are a few rights available under rights instruments, both at universal and regional levels as te rights. This means that there can be no derogation from them any circumstances.

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ne UDHR was adopted by the UN General Assembly by Resolution 217 (III) of ) December 1948.

ne establishment of a Commission on Human Rights (CHR) was recommended in 945 by the Preparatory Commission of the United Nations in order to deal with uman rights issues which could not be resolved during the original drafting of the harter. At its first session in 1946, the Economic and Social Council established e CHR. Currently, CHR consists of 53 (43 until 1991) members elected from among e UN members who serve the CHR in their capacity as governmental representatives.

ne International Covenant on Economic, Social and Cultural Rights and International ovenant on Civil and Political Rights, adopted *vide* UN General Assembly Resolution 200 (XXI) on 16 December 1966.

The non-derogable character of certain fundamental rights fin place in treaties relating to international protection of human rig the universal and regional levels.[4] A derogation clause has been inc in most international human rights instruments to safeguard the rig state to deal with emergency situations. Article 4 of the ICCPR pe states parties to derogate from eighteen articles in times of offic proclaimed emergencies. Similar provisions are available under A 15 of the European Convention on Human Rights and Fundam Freedoms (ECHR) and Article 27 of the American Convention on Hu Rights. However, no derogation clause appears in the African Ch on Human and People's Rights.

The adoption of specific derogation articles in the above-menti human rights instruments do not offend the general principle international law. Article 57[5] of the Vienna Convention on the La Treaties, 1969 permits the suspension of Convention obligation conformity with the provisions of the treaty, with the derogation cl supply in specific criteria necessary for the application of this rule. T is some striking resemblance between the derogation clauses and customary law doctrine of necessity, which excuses a breach international law if (*a*) a necessity exists threatening the preservatio the state, and (*b*) the danger is "so imminent and overwhelming time and opportunity are lacking in which to provide adequate mean defence".[6] States derogating from certain treaty provisions must comply with various procedural requirements, such as an offi proclamation of emergency, and notification to the relevant instituti These procedural limitations are mentioned under Article 4(3) of ICCPR, Article 15(3) of European Convention and Article 27(3 American Convention.

4. Rosalyn Higgins, "Derogation under Human Rights Treaties", *BYIL*, vol. 48 (1 78), pp. 280-320; Joan F. Hartuman, "Derogation from Human Rights Treat *Harvard International Law Journal*, vol. 17 (1976), pp. 503-37; Daniel O'Do "States of Exception", *International Commission of Jurists*, vol. 21 (1978), pp 60; Yogesh Kumar Tyagi, "Human Dignity, National Security and Internati Responsibility: Serach for a Symbiosis", in K.P. Saksena (ed.) *Human Rig Perspective and Challenges* (New Delhi, 1994), pp. 45-78; V.S. Mani, "Regi Approaches to Implementation of Human Rights" *IJIL*, vol. 21 (1981), pp. 96- Manoj Kumar Sinha, *Implementation of Basic Human Rights*, (New Delhi, 1

5. Article 57 of Vienna Convention of Treaties stipulates, "The operation of a Tr in regard to all the parties or to a particular may be suspended:
(a) in conformity with the provisions of the treaty; or
(b) at any time by consent of all the parties after consultation with the other contra States.

6. Ian Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester, 19 Shabtai Rosenne, *The Law of Treaties : A Guide to Legislative History of the Vi Convention* (New York, 1970).

## II. THREE MOST NEEDED REFORMS

s clear from above discussion that the reason for inclusion of ncy provisions in all international as well as regional human rights ients was mainly to empower the state to deal with extraordinary ons, which may arise from war, internal disturbance or natural ies. Ironically, states generally use these provisions in the pretext rgency situation to safeguard the political interest of the group in It has been observed that international protection of human rights ntial during crisis situations, where states suspend basic freedoms quently commit massive violations of human rights.

e commitment of each government to protect human rights is infact during the time of emergency. During this time states are even sed by their respective Constitutions to suspend fundamental rights r citizens. Unfortunately, they have shown a tendency to prolong ly proclaimed emergency to safeguard their own political interests.

is true that the drafters of international human rights instruments ied to adopt fool proof mechanism to restrict the misuse of ency provisions by the state[7]. However, a careful study of various encies proclaimed by states, from time to time, altogether gives a nt picture. In several cases states have violated these safeguards mpunity.[8]

eping in mind of such situations, it is hoped that three reforms sted below will help to check human rights violations by states the time of emergency. These three reforms are as follows: (A) ndence of Judiciary (B) Right to a Fair Trial (C) Inclusion of more erogable Rights.

### A. Independence of Judiciary

e first and foremost needed reform to ensure protection of human at the time of emergency is to maintain the independence of ary. The independence of judiciary is often undermined during ency through various ways, for instance, removal of competent , replaced by unqualified persons and the establishment of special

.P. Saksena, "International Covenant on Human Rights" *IYBIA* (1970), pp. 596-14.

n the basis of successive reports submitted by the Special Rapporteur between nuary 1985 and May 1995, it was reported that around 90 states have experienced ther *de facto* or *de jure* states of emergency during that period. Interestingly, if e list of countries that have proclaimed state of emergency during the past 10 years, ere transposed onto a world map it would be disturbing to know that it would cover most three quarters of the earth's surface. E/C/N.4/ sub.2/1995/20, paras. 10, 11.

courts. The tendency to make judiciary a rubber stamp of governme not very uncommon practice in a state of emergency.

Once the state authority proclaims emergency it automatically s exercising unlimited powers. The danger of this unchecked pow that the state may resort to arbitrary methods to silence the pe opposing the government. This particular situation may even bec worst when democratically elected government is overthrown by mil government. The suspension of the writ of *habeas corpus*, arbit arrest, trial conducted not by competent court (often manned incompetent persons) is common practice during time of emergenc

The only possible way to restrain the state from committing hu rights violations during the time of emergency is to make judic independent. It is clearly stated in ICCPR, that every state has obligation under Article 2(1) not only to respect human rights but to ensure the protection of these rights for the citizen. Thus, it is obligation of a state to allow the functioning of a 'competent impartial court' established by law, not set up arbitrarily. The independ Court should consist of professionally qualified persons. In true se an impartial court is one which is demonstrably fair to both parties case or free from any influence from the government.

The domestic court is the appropriate body to judge the validity emergency. As discussed above, sometimes a government decla emergency to protect its own political interests and to stay in power in such a situation independence of judiciary remains intact, certai then can a Court judge fairly whether the emergency was justified not. A number of cases involving an emergency much more controver than war or active insurrection exists. Several times, army has been ca merely to quell labour unrests and civilian disturbances. Determin whether a state emergency is of the sort that immediately threatens existence of a nation, at some level, managed by Courts. For exam in 1975 when Indira Gandhi declared emergency[9] in India, its vali was challenged in various High Courts of the country. Several H Courts found that the declaration of emergency was unjustifi Unfortunately, the Supreme Court of India in *A.D.M. Jabalpur v. Un of India*[10], upheld the validity of emergency. It was a Court badly sha by the experience of emergency in the face of undue execut interference.

9. Ved P. Nanda, "From Gandhi to Gandhi—International Legal Responses to Destruction of Human Rights and Fundamental Freedoms in India", *Denver Jou of International Law and Policy*, vol. 16 (1976), pp.19-42.

10. *A.D.M. Jabalpur* v. *Union of India*, AIR 1976 SC 1207.

Functioning of normal Courts is generally suspended by the military rulers. At the time of military regime, trial is conducted by the military Court and even trial of civilians Court without full guarantees of fair trial. Only in exceptional cases, such trial of civilians by military Court can be justified, when the charges against individual or group of individuals are very serious in nature and related to the military law. There is no doubt that the military ruler has a tendency to clip the power of judiciary arbitrarily. A glaring example of this practice was the *coup* in Greece in 1967, after which the military regime suspended life tenure for judges for a period of three days and then dismissed nearly thirty judges and prosecutors including the President of the Supreme Court.[11] Another example is that of the military regime in Bangaldesh which declared martial law in 1982, and issued a decree that any High Court judge could be removed by the "Chief Martial Law Administrator" without assigning any reason.[12]

The independence of judiciary is of utomost importance during the martial law period. A suspension of fundamental rights during this period must pass through a *strict scrutiny*. For example, the application of martial law to civilians during emergencies in the U.S. followed strict standards. The U.S. Supreme Court in *Ex Parte Milligan*,[13] held that military Courts lacked jurisdiction to try the defendant, who was a civilian of a State and upheld the authority of the government during the civil war in which the ordinary Courts were open and functioning without obstruction.[14]

Keeping in mind all this, it is imperative to maintain the independence of judiciary for the protection of human rights in time of emergency. A concrete effort should be made in this direction by international human rights instruments to make the right to an independent judiciary a non-derogable right. Independence of judiciary would help substantially in preventing the abusive exercise of emergency powers by the executive.

### B. The Right to Fair Trial

The right to fair trial[15] is second most needed reform envisaged under both international as well as regional human rights instruments. It is

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11. Stephanos Stravos, "The Right to a Fair Trial in Emergency Situations", *ICLQ*, vol. 41 (1992), pp.343-65.
12. *Ibid*, p. 31.
13. *Ex parte Milligan*, 71 U.S. (4 wall.) 2, 13 (1986).
14. Caludio Grossman, "Emergency situations in the United States and Latin America: A Comparative Study" (unpublished paper), p. 12.
15. Subrata Roy Chowdhury, *Rule of Law in Emergency: The Paris Minimum Standards in a State of Emergency* (London, 1989).

absolutely true that the right to fair trial is the most fundamental right victims of human rights violations at all times and specially in times emergency. The right to fair trial and its constituent elements includin the principle of *non-retroactivity* of criminal laws, are enshrined Articles 14 and 15 of ICCPR, Articles 6 and 7 of the ECHR and Articl 8 and 9 of ACHR. Inspite of these safeguards, widespread violations right to a fair trial in time of emergency have been well documented. I a number of cases reported to the Human Rights Committee (HRC concerning proceedings before military Courts, the accused was denie the basic legal assistance or military officers, not of the choice of th victims, acted as defence counsel.

Interestingly, it was realisd during the drafting of ICCPR that th right to fair trial should be included in the list of non-derogabl guarantees; however, this proposal was defeated at the drafting stag itself. It seems that the states parties which were participating in th drafting process were more concerned with giving the state enough powe to deal with emergency situations than about the rights of the individual However, a number of cases have shown that states have been violating human rights of their citizens with impunity during the time of emergency.

Detailed analysis of Articles 14 and 15 of the ICCPR by the International Commission of Jurists reveals that at least eleven elements of the right to fair trial are often suspended during the time of emergency.[16] They are as follows:

(1) Right to have an independent and impartial trial in military Courts in which security offences are tried;

(2) No Sentence shall be passed on the basis of confessions obtained as a result of coercion or torture;

(3) No Conviction shall be based upon evidence otherwise deposed by a witness but not in the Court of law on oath;

(4) The right to be informed promptly of the charges;

(5) The right to have counsel of one's choice;

(6) The right to have adequate time for the preparation of one's defence.

(7) The right to be tried without delay;

(8) The right to a public trial;

16. *Ibid*, p. 205.

(8) The right to appeal;

(9) The right not to be retried after a final judgment; and

(11) Non-retroactivity of criminal laws.

The protection of these rights is important during the time of emergency. Minimum guarantees of fair trial even during a state of emergency should be ensured for detained persons. The basic principle of fair trial is that of full equality of the parties in the proceedings before a Court without any discrimination between accused and prosecutor in terms of procedural rights. Another important principle is the right to a hearing before an independent, competent and impartial tribunal. Fortunately, this particular right has received minimum attention from international human rights experts and by non-governmental organizations. The other safeguard to accused is the right to be informed promptly and in necessary details of the ground on which he is detained and also in a language he or she understands. The right to legal assistance is another important right to accused. The HRC has found violation of this particular right in a number of cases.[17]

Human rights organisations and experts have highlighted on various occasions the importance of guaranteeing some procedural safeguards to accused persons particularly, during the time of emergency.[18] As discussed above international human rights instruments have given considerable space to state deal with emergency related offences. Sometime states find the normal procedures of investigation and criminal prosecution inadequate to deal with a particular situation. They have, therefore, made drastic changes in their criminal laws that go beyond the common procedure by which the guilt of accused is established.[19] In some cases, special emergency or military tribunals have been established

17. Stravos, note 11, p. 355.

18 International Commission of Jurists, *States of Emergency—Their Impact on Human Rights* (Geneva, 1983).

19. Martin S. Flaherty, "Interrogation, Legal Advice, and Human Rights in Northern Ireland," *Columbia Human Rights Law Review*, vol. 27 (1995), pp. 1-31; For example, two Statutes — the Northern Ireland (Emergency Provisions) Act 1991, and the Prevention of Terrorism Act (PTA) 1989, address the problem of political violence by encouraging the security forces to rely on custodial interrogation as one of the means of obtaining conviction. These Statutes continue to allow prolonged detention, ready admissibility of confessions, and a grave diminution of the right to silence. The English Criminal Procedure has traditionally recognised the admissibility of confession to a police officer.

to try civilians.[20] Also resort has been had to administrative detenti the orders of the executive to which the normal legal safeguards d apply. However, the HRC has held that the establishment of tribunals should only be exceptional, they do not *per se* constitut right to a fair trial.[21] The purpose of such a kind of law is to o information and convictions of the accused primarily through statements and confessions of detainees. The emergency provis applicable at trial ensure that the state may manipulate statements by accused during interrogation.[22]

The role of defence Counsel is crucial during the time of emerge The need for a lawyer is most important particularly when a perso brought into an interrogation centre for questioning. Genera emergency law provides few safeguards to protect the victi fundamental rights during the time of interrogation. HRC has n violations in respect of *incommunicado* detention under spe emergency measures.[23] The right to immediate access to counsel of o choice upon arrest or detention is most clearly and authoritatively forth in the United Nations Basic Principles on the Role of Lawye The presence of counsel during the time of interrogations is the guarantee that can effectively protect the right of the acused not to forced to incriminate himself.

These safeguards will certainly help to prevent ill-treatmen detainees. The key to substantive rights is the right to fair trial, and implementation of these procedures must begin during the stat emergency.

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20. The Nigerian government by Presidential Order (State Security Detention of Pers issued Decree No. 2 of 1984; the Federal Military Government (Supremacy Enforcement of Powers) Decree No. 12 of 1994, Civil Disturbances (Sp Tribunals) Decree No. 2 of 1987, Treason and other Offences (Special Mil Tribunal) Decree No.1 of 1986, had violated Article 14 of the ICCPR; UN Doc. C C/97/add. 64, Nigeria, mtg. 1449th of 9th April 1996, paragraphs 8 and 11.
21. See, General comment on Article 14, Official Records of the UN General Assen 39th session, Supl. No. A/39/40/1984.
22. In Northern Ireland, the Criminal Evidence Order of 1988 provides that a neg inference may be drawn from pre-trial silence in a number of situations. cf. Flah note 19, p.5.
23. *Ramirez* v. *Uruguay*, *com.*6/177, p.49; *Sequeria* v. *Uruguay*, com. 11/17, p.59; HRC has found in these cases that authors of the petition were detained under "pr security measures" without charges. However, the Committee has rejecte respondent government's defence of the existence of emergency situation.
24. The Basic principles were adopted by the Eighth United Nations Conference o Prevention of the Crime and the Treatment of Offenders in August-September, 1 U.N. GAOR, 45 sess. (1990).

## C. INCLUSION OF MORE NON-DEROGABLE RIGHTS

The non-derogable character of certain fundamental rights is no longer a doctrinal trend; it finds its place in treaties relating to international protection of human rights at both universal and regional levels. These non-derogable rights which do not permit any kind of derogation are fundamental rights. At the universal level, ICCPR contains seven immutable core rights under Article 4(2) which does not allow any derogation; they are the right to life; the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment; the right not to be held in slavery or servitude; the right not to be imprisoned on the ground of inability to fulfil a contractual obligation; right against an *ex-post facto* law; the right to recognition everywhere as a person before the law and the right to freedom of thought conscience and religion.[25]

On the regional plane, the shortest list of four non-derogable rights incorporated under Article 15(2) of ECHR. These four non-derogable rights are — the right to life; the right not to be subjected to torture or to inhuman or degrading treatment or punishment; the right not to be held in slavery or servitude; and the right not to be held guilty in retroactive application of penalties.[26]

The longest list of eleven non-derogable rights embodied in Article 27(2) of ACHR. The non-derogable rights under the American Convention are the right to juridical personality; the right to humane treatment; the freedom from slavery, freedom from *ex-post facto* laws; the freedom of conscience and religion; the rights of the family; the right to a name; rights of the child; right to nationality; the right to participate in government or of the judicial guarantees essential for the protection of such rights.[27]

The three human rights instruments discussed above indicate that there are four non-derogable rights in common to all these three instruments. They are namely, the right to life; the right to be free from torture and other inhuman or degrading treatment or punishment; the right to be free from slavery or servitude; and lastly, the right to be free from retroactive application of penal laws.

However, there are a few important rights that are not included under the list of non-derogable rights, which are essential for the protection of fundamental rights during the time of emergency. They are so interrelated

25. Articles 6, 7, 8 (1) and (2), 11, 15, 16 and 18 respectively.
26. Articles 2, 3, 4 (1) and 7 respectively.
27. Articles 3, 4, 5, 6, 9, 12, 17, 18, 19, 20 and 23 respectively.

to non-derogable rights that without their protection full realisation o the other rights could not be possible. These rights are namely, du process of law and personal liberty of the individual.

The due process provision of Article 14 of the ICCPR is not include as non-derogable right. The effect of the derogability of Article 14 i that in times of emergency, when due process rights are suspended, eve death sentence can arguably be imposed following a summary procedure The safeguard provided under Article 6(2) which states that the death penalty can only be carried out pursuant to a final judgment rendered by a competent court. This safeguard has no value or relevance during the time of emergency where a state is emponered to sit in judgment over the competence of the court.

Even the ECHR has not included a due process clause as a non-derogable human right. Emergency situations that constitute a threat to the independence or the security of the state often require the government to limit the right to personal liberty. However, the American Convention has included the due process as non-derogable right. The final clause of the second paragraph of Article 27 of the American Convention on Human Rights prohibits the "suspension of the judicial guarantees essential for the protection of the rights considered as non-derogable by the American Convention on Human Rights.

The Latin American Countries have been facing frequent political instability. The clause which has given essential judicial guarantees can be effectively utilised in restricting the application of military law on civilians. Military law has been invoked with much abuse in the Latin American countries. Generally, jurisdiction over civilians by military tribunals and the application of the military law should only be allowed in situations where the normal judicial system is inoperative.

A right is not fully protected unless governmental actions or laws restricting that right can be challenged for their constitutional or legal validity. Accordingly, such provisions as *amparo* and *habeas corpus*, when utilised to test the constitutionality of a given action or law, are clearly within the purview of "essential judicial guarantees clause".

The Inter-American Court pronouncing in its most important advisory opinion on *habeas corpus in emergency situations*, ruled that review of detention orders in emergency situation is non-derogable.[28]

The American Commission had requested the American Court whether the executive was required to bring a detainee before a judge in

28. The Advisory Opinion OC-9/87 of 6th October 1987, paragraphs 31-33, 38 and 40. Annual Report of the Inter-American Court of Human Rights, 1988.

order to allow the detainee to challenge the legality of the detention during a state of emergency. The question arose because Article 7, which deals with the right to personal liberty, is not included in the list of non-derogable right set forth in Article 27(2). The judicial protection of which may not be suspended during a state of emergency. The question was whether it followed that the judicial remedy, which safeguarded a derogable right might also be suspended during an emergency![29] The Court observed that the writ of *habeas corpus* may never be suspended, and it sympathised with the Commission's viewpoint that torture tends to occur during long period of *incommunicado* detention. The opinion is primarily of importance for two rulings made by the Court in interpreting the American Convention on Human Rights.

1. Only democratic governments may avail themselves of the right to declare a state of emergency, and only under certain closely prescribed circumstances; and
2. the writ of *habeas corpus* may never be suspended.

On the line of American Convention on Human Rights, 'judicial guarantees' which are essential for the protection of non-derogable rights in time of emergency should be included as non-derogable rights under both ICCPR and ECHR.

## CONCLUSION

This note proposes that three essential reforms should be brought about for protection of basic human rights during emergencies. The role of the judiciary in protecting individuals against repression and abusive exercise of emergency powers is one of the best guarantees for a rule of law in a state of emergency, if it found no valid justification for imposition of such emergency.

Secondly, the right of fair trial should be provided to the accused. This should include right to legal assistance, right of speedy trial and the right to counsel. These minimum rights should always be guaranteed when recourse is had to judicial proceedings, whether before ordinary Courts of law or before special tribunals. There must exist effective safeguards which will help to prevent the ill-treatment of detainees and which will guarantee freedom from unlawful or abusive detentions, and ensure that the duration of an orginally "lawful" detention does not alter its character, transforming it into a punitive measure.

29. Christina M Cerna, "The Structure and Functioning of the Inter-American Court of Human Rights", *BYIL*, vol. 62 (1992), pp. 135-229, at p. 187.

Lastly, the inclusion of few more rights as non-derogable rights certainly will help in protection of human rights during the time of emergency.

These three reforms will hopefully help restricting abusive exercise of the power of the executive during the time of emergency, and safeguarding the rights of individual during the period of emergency.

International protection of human rights is essential during crisis situations where states suspend basic freedoms and frequently commit massive violations of human rights treaties. It is necessary, however, for improved human rights to be balanced by the legitimate interests of state, to perform its public duties for the common good, faced with emergency situations.

# PROTECTION ZONES IN INTERNATIONAL HUMANITARIAN LAW

BIMAL N. PATEL*

## I. INTRODUCTION

Protection Zones, a historical-legal concept, has evolved as a mechanism to provide protection and humanitarian services to persons affected by armed conflicts. Although the concept of protection zones has been in use since the 7th century, it was not codified in international law until 1949, when the Geneva Convention (Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, of 12 August 1949) (GCI) explicitly mentioned the concept of Hospital Zones. In this century, after the World War I, there was a widespread public movement, mainly in Europe to provide greater and more effective protection to non-combatants during armed conflicts. However, it was not possible until after the World War II to codify the concept of Safety Zones/Hospital Zones in international law. Thanks to the tireless efforts of ICRC, the Geneva Convention I and Geneva Convention IV (GCIV) and Additional Protocol I (API) of 1977 defined and provided terms and conditions of establishment and functioning of different types of protection zones. Between 1949-1977, the concept of protection zones has undergone a considerable legal development mainly due to the result of impacts of armed conflicts and the efforts of the ICRC.

Although the UN was created after the World War II to prevent the succeeding generations from the scourge of war, it is humanitarian orgnisation like the ICRC which has taken a lead in codifying the concept as well as putting its resources at the disposal of the international community during the armed conflicts to realise the practical value of the protection zones. Infact, the UN's role in the functioning of the protection zones between 1949-1977 is very minimal, if any. In light of these remarks, I will attempt in this paper to evaluate the concept of protection zones, legal developments (codification of the concept), and its practical value between 1949 to 1977 (from the GCI to API).

This paper provides a detailed descriptive analysis of the historical evolution of the concept of Safety Zones between 1949-1977. As far as

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the substance of the paper is concerned, it will manily use two l instruments: GCs and API. For this purpose, a substantial use commentary on these legal instruments is made.[1] However, in beginning, the paper will discuss the pre-1949 initiatives and eff which were undertaken by religious and humanitarian individuals in area.

This paper argues that;

1. the legal developments in the field of protection zone significantly widened the scope of protection of persons affec by armed conflicts between 1949 and 1977.
2. apart from the protection of persons affected by the arm conflicts, there are other considerable qualitative developme in the concept which have taken place during this period and
3. despite the practical value and use and theoretical developme there is a definite need to further codify the concept in posit law.

## II. HISTORICAL BACKGROUND

The idea of having protected zones during armed conflict is a ve old one. Even during the 7th century, in ancient Greece, temples a shrines offered holy sanctuary even if they were not always respect Furthermore, as Y. Sandoz mentions, the Islamic tradition whi enshrines the principle of sparing the non-combatant civilian populati also offers noteworthy examples, the most famous probably being t instructions issued by the second Caliph Omar during the capture Jerusalem in the seventh century.[2]

In the 19th century, two major initiatives were taken one by t International Red Cross Conference (IRCC) and other by H. Duna known as the father of international humanitarian law, to establish t protective zones during the armed conflicts. However, both initiati were not materialised during that time because they were swept away the current of events. The IRCC Conference in Berlin in 1869 came with a recommendation: "[T]hat Governments agree, in time of war,

1. J. Pictet (ed), *Commentary — Geneva Convention I for the Amelioration of Condition of the Wounded and Sick in Armed Forces in the Field*, (ICRC, Gene 1952) & *Commentary on the IV Geneva Convention of 1949*, (ICRC, Geneva 19
2. Y. Sandoz, *The Establishment of Safety Zones for Persons Displaced within th Country of Origin*, Multi-choice Conference of International Legal Issues arising un the United Nations Decade of International Law, Doha (Qatar), 22-25 March 1 at p. 119.

allow the wounded and sick who may be in spas and hydros, the same privilege as those who are wounded or fall sick in the field, and allow such establishments the same privileges as are enjoyed by field hospitals".[3]

In 1870, Henry Dunant made two proposals, the protection in combat zones of the wounded and sick to the Empress Eugenie[4] and the protection of civilians to the Foreign Minister of the Government of National Defence of France. In his proposals, he envisioned the scheme for the creation of neutral zones, suitably marked, and given recognition by the enemy which was adopted 79 years later by the Geneva Diplomatic Conference of 1949.

In the aftermath of the World War I, in 1922, at a meeting of the Legál Commission in the Hague and the meeting of the International Conference of Military Medicine and Pharmacy, a scheme for the protection of certain categories of persons in certain agreed places was discussed. However, it was in 1929, that a definite proposal for drafting international agreements on the subject of Hospital and Safety Zones was made by a French Army doctor, General Georges Saint-Paul. He proposed, under the title *'Lieux de Geneve'*, that refuge zones should be set aside for non-combatants. He put forward an elaborate proposal on this subject to the French Government with a suggestion to put the proposal before the League of Nations, however, the Government did not implement the suggestion. Nonetheless, he continued his efforts to spread the idea of safety zones until his death in 1937.

### A. 1934 Draft Convention

In 1934, a Commission of Medical and Legal Experts meeting at Monaco drew a preliminary Draft Convention which proved to be of significant importance to the Geneva Conventios.[5] It defined Hospital Towns as towns reserved for the needs of the medical services, to the exclusion of all military use. Some features of this Draft Convention are noteworthy as they had significant impacts in the text of the Geneva Conventions. These features were;

1. notification of these Towns, in peacetime by diplomatic channels, in wartime through the Protecting Powers, or an international agency to be determined

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3 *Hospital Localities and Safety Zones*, ICRC (Geneva, 1952) at p. 3.

4 The proposal was not followed up owing to the rapid development of military events. See *ibid*; at p. 2.

5. See Pictet, *Commentary on the GCI*, note 1 at p. 208.

2. recognition of the right of the adverse State to challenge creation, if it has sufficient reasons for doing so and
3. retention of the privileged status of the zones, in case of mi occupation.

The draft also provided for places called Hospital Localities in w fixed or mobile medical units, working in close co-operation with line positions could be grouped; these Localities would be giver same safeguards as Hospital Zones. The Belgian government, which at first contemplated holding a Diplomatic Conference to approve draft, was later obliged to abandon its intention.[6]

In addition to the Hospital Towns and Localities, the Draft def Safety Towns, which would be given the same privileges as Hos Towns, 'provided they fulfilled the same formalities of notification supervision'.

## B. The 1938 Expert Commission

This Commission drew the '1938 Draft' in the form of an Agreem Some of its main features were important as the text of its articles lar remain the same in the Geneva Conventions and this Draft Agreem was annexed to the Geneva Conventions. The draft used term 'Hos

6. It is important to understand the terminology of these protection zones as they c an impression to the readers in the first instance that they are just one type of z and can be interchangeably used. As the ICRC defines:
(a) Hospital Zones and Localities are more or less permanent, organised outsid combat zone and intended to shelter from the effects of war the wounded and military and civilian.
(b) Safety Zones and Localities; usually permanent, organised outside the combat and intended for certain categories of civilian needing special protection: chil old persons, pregnant women etc.
(c) Neutralised Zones: usually provisional, set up in a combat zone or localit sheleter the wounded and sick, both combatant and non-combatant, as well a general civilian population, taking no part in hostilities in the area.
This is the terminology used in the 1949 Geneva Conventions. Locality me definite place, usually containing certain buildings. Zone is a relatively large st of open country, taking in one or more localities.
Place of refuge is common paralance of any portion of territory so organised afford refuge to certain categories of persons. It covers Hospital Zones and Local Safety Zones and Localities, and Neutralised Zones. If we had to go into detail a terms, it may be stated that, in practice, and even in theory, solutions can al mixed. The system proposed in the 1949 Conventions is very flexible in this res A Hospital Locality may shelter both military wounded and civilian patients; a S Zone could shelter wounded and sick, in addition to given categories of civil See note 3 at p. 8.

Zones and Localities', thus replaced the wording of the Monaco Draft-Hospital Towns. The draft laid down for the first time that the Zone shall be indicated by the emblem of the Geneva Convention. It furthermore stated that notification, both in peacetime and wartime, has to be through the ICRC. The grounds of objection have to be stated, and time limits for objections are fixed. Conciliation procedure is by reference to the Geneva Convention. It maintained that zone could be continued as such by the Occupying Power unless there was a decision to the contrary by one or other of the parties. Supervision was by a Commission designated by the ICRC. However, this Commission did not deal with the question of Safety Zones for civilians. It was practical examples of Spain and China which afforded important lessons in this respect.

### C. Madrid Zone

The Madrid Zone, the place of refuge for population affected by war in Spain was created by General Franco in the District of Madrid during November 1936. The Zone was by and large successful in providing safety to the population who refuged into it, but there were few noteworthy aspects of this Zone:

(1) the constitution and boundaries of the Zone were decided by the adverse party, and not by the interested party, and (2) there was no formal agreement between the two parties and nor was the Zone subject to any supervisory procedures. Thus two of the essential conditions for the constitution of Safety Zone were missing: agreement and supervision.

The Zone in Madrid was the consequence of a military decision taken unilaterally by a Government in order to spare part of a besieged town. The Madrid Zone provided an important stimuli for those who were working for Hospital and Safety Zone agreements and was an important step towards the protection of civilians in wartime.

### D. Shanghai Zone

The Shanghai Zone, a place of refuge for 250,000 Chinese who flew during the Sino-Japanese war in 1937, was created by Father Jaquinot de Besange. The Zone was set up and organized in complete independence of the International Committee, based on the principle of Red Cross. The Shanghai Zone played a decisive role in subsequent thinking on safety zones.[7]

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7. See Sandoz note 2, at p. 122.

### E. The Second World War

During the World War II, the ICRC made several attempts to persua the belligerents to *ad hoc* agreements on the creation of Hospital or Saf Zones, but without much success. For example in 1940, it launched appeal for the protection of the civilian population against aer bombardment. It sent a Memorandum to the Governments advocati the establishment of protected areas for military and civilian wounc and sick and for certain vulnerable categories of the civilian populati who were not directly involved in hostilities. Numerous private propos were made by individuals to set up hospital or safety zones at Sien Bologna, Imola, Constance, Tromso and Shanghai. These propos could not be brought into effect officially, as they did not come fr belligerent Governments and the latter continued to treat the wh question with great reserve.[8]

### F. The Jerusalem Zone

The establishment of Jerusalem Zone, the protection zone creat during the conflict in Palestine in 1948, played a decisive role in t eventual establishment of the Neutralised Zone in the GCIV. Some of features were; the zones were entirely administered by the ICRC, a not by the interested parties. Provisional shelters, instead of perman zones behind the fighting lines, were set up in the actual fighting zc and opened for all of the local population. The zones were for use o during the periods when the fighting presented and immediate danger non-combatants. In short, the example of Jerusalem led to a n development in the Fourth (Civilian) Convention — Neutralised Zor which can be set up temporarily, and in the actual fighting area.[9]

## III. HOSPITAL ZONES AND LOCALITIES

As mentioned earlier, efforts to establish protective zone got fruiti when the idea of Hospital Zones and Localities was codified in positi law in the Geneva Convention I (GCI) for the Amelioration of t

8. For a detail description of these proposals and initiatives, see note 3, at pp. 16
9. The question arises why Neutralised Zones in combat areas? As J. Pictet argues theory, the first tendency had been to establish permanent zones behind the fr in order to shelter certain elements only of the civilian population from long ra weapons, especially bomber aircraft, but in actual practice, it was, on each occasi found necessary to establish temporary places of refuge in the actual area wh fighting was taking place, in order to provide shelter for the whole of the lo population, who were in danger as a result of the military operations in the vicin See Pictet, note 1, at p. 210.

Condition of the Wounded and Sick in Armed Forces in the Field. Article 23 of the GCI stipulated the terms and conditions governing the establishment and functioning of the Hospital Zone and Localities. The scope of the article was to protect military wounded and sick and medical and administrative personnel from the effects of war.

As far as Article 23 is concerned, not all ideas but only some ideas as envisioned in the proposal of French Surgeon-General Georges Saint-Paul were reflected in the GCI. Furthermore, the content of the article was largely based on the previous experiences and proposals and there was not any new provision in the GCI. In fact some questions which remained unanswered during the pre-GCI efforts continued to remain in existence even after the adoption of Article 23. For example, there is no mention either in the Draft Agreement which was annexed to the GCI or in the text of the Convention itself, of the flight of aircraft over hospital zones.[10] The issue of overflight of aircrafts over the protection zones remains unanswered in the text of the GCs as well as in the API.

The Draft Agreement annexed to the GCI made attempt to answer certain confusions which were likely to pose problems and which were not tackled during the pre-GCI initiatives. In particular, it fixes the conditions which hospital zones must fulfill, these are;

1. size of the Zone (small part of the country's territory),
2. size of the population in the zone (thinly populated),
3. location (remoteness from military objectives), and
4. choice of area (place which is not important for the conduct of war).

Furthermore, the Hospital Zone shall also fulfill two obligations; exclusion of military transport and absence of military defence. The Monaco Draft expressly authorised military convoys in transit to make temporary use of communication and transport crossing a hospital zone, but due to the sensitive and probability of misuse, the Draft Agreement annexed to the GC excluded the passage of military convoys. There were also objections to the passage of civilian convoys in transit, but the Draft Agreement did not exclude this from its text.

There are two major weaknesses in Article 23. First, the Hospital Zones will not, strictly speaking, have any legal existence, or enjoy protection under the Convention, until such time as they have been recognised by the adverse Party. This will entail the conclusion of an

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10 "In the absence of any special provision, it must be assumed that both friendly and enemy aircraft may fly over them". *Ibid*; at p. 421.

agreement between the Powers which has established zones in i territory and the powers with which it is at war. The agreement will th be concluded, as a general rule, after the outbreak of hostilities. Secondl there is no obligation to set up the Zones because Article 23 is option in character. As such, the authors of the Convention had to draw attentic to importance of such zones from a humanitarian point of view, and simply recommend their adoption in practice.

Apart from these two major drawbacks, an important provision whic should have been in the text of the Convention was maintained in th Draft Agreement. Article 7 of the Draft Agreement mentions that th Powers shall communicate to all the High Contracting Parties in peacetim or on the outbreak of hostilites, a list of the hospital zones in the territorie governed by them. They shall also give notice of any new zones set u during hostilities. A provision of this nature should have been inserte in the Convention itself. It is to be noted that the Draft Agreemen however, is only in the nature of a suggestion or example and th Diplomatic Conference which adopted the GCI decided to annex th Agreement with the object of promoting the establishment of hospita zones.

## IV. GENEVA CONVENTION IV (TREATMENT OF CIVILIAN PERSONS IN TIME OF WAR, 1949)

GCIV stipulated the terms and conditions governing th establishment and functioning of two types of zones: Hospital and Safet Zones and Locality, Article 14; and Neutralised Zones, Article 15 Although, the GCIV was also adopted on the same day as GCI on 1 August 1949, there were some significant positive changes in th substance and procedural aspects of these zones as compared to th Hospital Zones and Localities. The Hospital and Safety Zones an Locality drew lessons mainly from the Madrid Zone experience wherea the practical experiences of the Shanghai Zone and Jerusalem Zone wer the most important, in particular the Jerusalem Zone, for the purposes o the Neutralised Zones.

What were these positive changes?

1. Protection of persons : Only military wounded and sick and medica and administrative personnel were entitled to get protection unde the Hospital Zones and Localities whereas under the Hospital an Safety Zones and Locality the cover of protection was extended t civilian wounded and sick and delimited categories of civilia

population, namely, wounded, sick and aged persons, children under 15, expectant mothers and mothers of children under seven. The main rational to extend this protection to certain delimited categories of population was that they are persons who are taking no part in the hostilities and whose weakness makes them incapable of contributing to the war potential of their country.[11] Furthermore, it is upheld that the members of the population who live permanently inside the Zones are given the right to stay there. The Neutralised Zones can give shelter to both civilian and military wounded and sick, as well as all civilian persons who take no part in hostilities. This is in marked difference to Article 14 because the whole of the population in the combat area is authorised to take refuge in these Zones and not only certain categories as mentioned in Article 14. Thus, scope of protection of persons widened in the GCIV. It shall be noted that protection is not accorded under Article 14 to the persons listed, but to the hospital and safety zones and localities as such. The persons themselves are entitled to protection independently of the refuge zones, which are merely a means of providing such protection.

2. Article 14 is a comprehensive combination of zones which are at one and the same time (hospital and safety zones) might be set up, to shelter both civilian and military wounded and sick, as well as certain categories of the civilian population.

3. Under the Neutralised Zones, the Parties concerned should agree upon the geographic position, administration, food supply and supervision of the proposed neutralised zone and shall also make a written agreement which shall fix the beginning and the duration of the neutralisation of the zone. Article 23 of the GCI and Article 14 of the GCIV did not elaborate such detail technical guiding principles but simply referred to the Draft Agreement, which as mentioned above, was of simply recommendatory in nature.

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11. Children under 15 and mother of children under 7 were chosen because the Conference considered that they were appropriate, reasonable and generally in accord with the requirements of the physical and mental development of children. Earlier mothers of children under 4 only were chosen to be given the protection, but it can be said that this is positive development. No limit was fixed for aged persons. The Conference refrained from naming a definite age, preferring to leave the point to the discretion of governments. 65 seems, however, to be a reasonable age limit. It is often the age of retirement, and it is also the age at which civilian internees have usually been released from internment by belligerent powers. This question still remains valid as the additional Protocol I to Geneva Convention also did not define the age limit. See Pictet note 1, at p. 126.

4. Unlike the Hospital and Safety Zones and Localities, where the Contracting Parties may establish at their own will the Zones an Protecting Power or the ICRC may lend their good offices in regard, the Neutalised Zone went one step further. It mentions "[ Party to the conflict may, either direct or through a neutral Stat some humanitarian orgnisation, propose to the adverse Part establish, in the regions where fighting is taking place, neutral zones...".[12] This clearly means that a Party to the conflict throu neutral state or a humanitarian organisation with repute such as I can make proposal to the adverse Party to establish and admini the Neutralised Zones. The role of neutral power or humanita organisation in the establishment of protection zone was entertained in the GCI and Article 14 of the present Convention

## V. ADDITIONAL PROTOCOL I OF 1977

Between 1949 and 1977, the protection zones were put to the during several armed conflicts. However, based on four experien during this period, we can make few important remarks about practical value and effectiveness of these zones. These four experien are namely, the neutralized zones of Dacca (1971), the neutralised zo of Nicosia (1974), the neutralised zone of Sagion (1975) and the hosp and safety zone at Phnom Penh (1975). First, in all these instances, ICRC took an independent initiative to establish and administer neutralised zones. Although the text of the neutralised zone in Arti 15 of the GCI envisoned that, "any Party to the conflict... throug neutral state or some humanitarian organisation, propose to the adve Party to establish... neutralized zones", it can be concluded that it bec customary during these cases for the ICRC to establish the neutrali zones in the first instance and seek guarantee from the warring par thereafter.

Secondly, the protection zones in question were not *stricto se* meeting the criteria of that zones. For example, in case of the neutrali zones of Saigon, the ICRC admitted only very restricted categories persons and the criteria applied were more akin to hospital and Saf Zones (Article 14, GCIV) than for neutralised zones. The hospital safety zone at Phonm Pehn had more in common with the criteria down for neutralised zones than the hospital and safety zone. Th even when the prctecting zone was neutralised zone as in the case of neutralised zones of Nicosia, it did not provide protection to all catego

12. Article 15, Neutralised Zones, Geneva Convention IV of 1949.

of persons as mentioned in Article 15. The Zones were kept only to civilians and not to wounded and sick combatants, as mentioned in the stated article. Fourth, all these neutralised zones were created after the fighting broke out in the area as such it could not stop killings and sufferings of innocent persons in very initial phase.

Additional Protocol I (API) to the Geneva Conventions spelt out the idea of establishing Non-Defended Localities (Article 59) and Demilitarised Zones (Article 60) and the terms and conditions of their functioning.

### A. Non-Defended Localities

1. Article 59 (1) explicitly mentions that "[I]t is prohibited for the Parties to the conflict to attack, by any means whatsoever, non-defended localities". This paragraph reiterates almost entirely the rule contained in Article 25 of the Hague Regulations of 1907 ("the attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited"). Under this paragraph, which confirms and codifies customary law, a locality becomes a non-defended locality whenever the four conditions laid down are met.[13] Thus the rule of this article must be obeyed even in the absence of a declaration or an agreement. Thus, the concept of protection zone which in 1949 were of recommendatory nature become an obligation on the part of conflicting parties. Because they cannot attack non-defended localities and thus forced to prevent in principle the killing and unnecessary sufferings of persons living therein.

2. Protection of persons: The protection cover was extended in the GCS to only certain categories of persons, however, in accordance with Article 59, if four conditions in paragraph 2 of that Article are met, entire population living in such area is protected.

3. Once the declaration of a non-defended locality has been transmitted, it is clearly no longer possible to go back on it without giving sufficient prior warning to the adversary — otherwise the declaration could be considered as an act of perfidy in accordance with Article 37—Prohibition of Perfidy of the API. The locality will retain its status as

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13. Article 59 (2) stipulates these four conditions:

1. All combatants, as well as mobile weapons and mobile military equipment must have been evacuated;
2. No hostile use shall be made of fixed military installations or establishments;
3. No acts of hostility shall be committed by the authorities or by the population; and
4. No activities in support of military operations shall be undertaken.

long as the declaration is not withdrawn or the adversary does not objec This kind of provision was lacking in GCI and GCIV.

4. Under the concept of non-defended locality, both parties hav obligations. The party which creates the zone shall notify the advers Party through various channels, a public declaration of the creation o the locality is not sufficient. The adverse or recipient party also ha obligations. It must acknowledge receipt of the declaration. If the advers party considers that the conditions laid down are not fulfililled, it mus immediately so inform the party making the declaration. If it sends a negative response, the adverse party must indicate the exact points or which the conditions laid down have not been fulfilled, in such a way that those who made the declaration can remedy them, and then make another declaration.

5. If one or more of the conditions laid down in paragraph 2 of the Article is not fulfilled, the defended locality loses its status, however, it is recommended that before taking measures against a locality a declaration should be made or reasonable notice should be given with a view to recreating a situation compatible with paragraph 2.

6. In the event that declaration is validly rejected, the locality continues to enjoy protection under other provisions of the Protocol and other rules of international law applicable in armed conflict. This is another important provision which is lacking in the relevant articles of the Geneva Conventions.

7. The question of flight of friendly or enemy over the non-defended locality is not touched upon but assumed to be guided by the same understanding as applicable in the relevant articles of the Geneva Conventions.

## B. Demilitarised Zones

The essential character of the zones created in Article 60 is that they have a humanitarian and not a political aim; they are specially intended to protect the population living there against attacks. Such zones can be created by agreement, a simple unilateral declaration is not sufficient. This provision, in this respect differs from Article 59, as the latter envisions the possibility of unilateral declaration of the creation of non-defended localities.

One striking feature of the demilitarised zone is that the agreement establishing the demilitarised zones can be concluded in peacetime. However, it is unlikely that two or more States will agree in advance to keep one or more zones clear of military operations in the event of a

conflict breaking out between them. As J. Pictet argues, this seems, at least, a rather theoretical point.[14]

The conditions laid down in paragraph 3 of this article and paragraph 2 of Article 59 are almost the same as those for non-defended localities. However, there is a slight difference from Article 59. Article 59 says that no activity in support of military operations may be undertaken while Article 60(3) provides that any activity linked to the military effort must have ceased. Furthermore, the language used in Article 60 has a slightly wider scope, and undoubtedly covers those factories which are mainly operating for the armed forces. However, this condition is not absolutely clear and that is why the Parties to the conflict are invited to include in the agreement an interpretation of this condition.

There is a potential drawback in this article. Paragraph 7 of the article provides that a material breach may lead to the end of the demilitarised zone. Thus, a zone deprived of its privileged status may increase the risk to which the population is exposed in practice. Therefore, the adverse Party must take the requisite precautionary measures and remember that "in the conduct of military operations, constant care shall be taken to spare the civilian population and civilian objects".[15]

## VI. CONCLUDING REMARKS

The concept of protection zones has become a very important supplement in the efforts of minimising the sufferings of persons affected by armed conflicts. This concept which was originally envisioned in recommendatory form in 1949, now has become an obligation which is of binding nature on the part of parties to the conflict. The concept earlier was conceived to provide protection to certain categories of people affected by armed conflicts, but gradually the protection coverage has been extended to all civilians who are not undertaking military activities as well as to all those who live in the protected zones.

A general concern persists that the protection zones are, at least, assumed in theoretical terms, to provide protection to victims of armed conflicts between two States only, but the recent history of internal armed conflicts (Rwanda, Former Yugoslavia, Sri Lanka, Iraq) suggests that there is an urgent need to codify this concept in positive law which could successfully be used in such situations. Another major concern is that despite the fact the demilitarised zones can be concluded in peacetime

14. See Pictet note 1, at p. 708
15. *Ibid*, at p. 721

before actual war takes place, it has not happened so far, thus, remain theoretical point.

The foregoing analysis shows that the concept of protection zo has developed more as a result of impacts of conflict than sinc governmental efforts. In light of this fact, it is essential tha governmental conference dedicated to achieve a comprehensive set rules and practices to establish and operate the protection zones in fut armed conflicts, both internal and international, is urgently needed. T reinforces the belief held by many others that the creation of protecti zones within the framework of international humanitarian law must contemplated first and foremost as an instrument serving the gene requirement of providing the best possible protection and assistance population during armed conflicts.[16]

As asserted in the beginning several individuals and humanitari organisations have played a more important role than governmen machinery in taking initiatives and effective functioning of the protecti zones. This conclusion still remains very much valid even during t armed conflicts of this decade. It is important that their role proper stipulated and encouraged in the treaty texts. As one party to the confli tend to respect humanitarian organisations more than the adverse part an encouraged role of such organisations is a welcome suggestion f the success of protection zones.

16. See Sandoz note 2, at p. 135.

# JUDICIAL DECISIONS

## INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

**27 August 1999**

**Southern Bluefin Tuna Cases**

**(New Zealand v. Japan; Australia v. Japan)**

**Requests for provisional measures***

### ORDER

*Present* : *President* MENSAH; *Vice-President* WOLFRUM; *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; *Judge ad hoc* SHEARER; *Registrar* CHITTY.

THE TRIBUNAL,

composed as above,

after deliberation,

Having regard to article 287, paragraph 5, and article 290 of the United Nations Convention on the Law of the Sea (hereinafter "the Convention" or "the Convention on the Law of the Sea") and articles 21 and 25 of the Statute of the Tribunal (hereinafter "the Statute").

Having regard to articles 89 and 90 of the Rules of the Tribunal (hereinafter "the Rules"),

Having regard to the facts that Australia became a State Party to the Convention on 16 November 1994, that Japan became a State Party to the Convention on 20 July 1996 and that New Zealand became a State Party to the Convention on 18 August 1996,

Having regard to the fact that Australia, Japan and New Zealand have not chosen a means for the settlement of disputes in accordance

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* *Source* : Mimeographed Order of the ITLOS.

with article 287 of the Convention and are therefore deemed to h accepted arbitration in accordance with Annex VII to the Conventio

Having regard to the Notification submitted by New Zealand to Ja on 15 July 1999 instituting arbitral proceedings as provided for in Ann VII to the Convention in a dispute concerning southern bluefin tuna,

Having regard to the Notification submitted by Australia to Japan 15 July 1999 instituting arbitral proceedings as provided for in Ann VII to the Convention in a dispute concerning southern bluefin tuna,

Having regard to the Request submitted by New Zeland to t Tribunal on 30 July 1999 for the prescription of provisional measur by the Tribunal in accordance with article 290, paragraph 5, of t Convention.

Having regard to the Request submitted by Australia to the Tribun on 30 July 1999 for the prescription of provisional measures by th Tribunal in accordance with article 290, paragraph 5, of the Conventio

Having regard to the fact that the Request of New Zeland was entere in the List of cases under No.3 and named *Southern Bluefin Tuna* Cas (New Zealand v. Japan), Request for provisional measures,

Having regard to the fact that the Request of Australia was entere in the List of cases under No. 4 and named *Southern Bluefin Tuna* Cas (Australia v. Japan), Request for provisional measures,

Having regard to the Order of 16 August 1999 by which the Tribuna joined the proceedings in the Cases concerning the Requests for th prescription of provisional measures,

Makes the following Order:

1. *Whereas* Australia, Japan and New Zeland are States Parties t the Convention;

2. *Whereas*, on 30 July 1999 at 8:38 a.m., New Zeland filed wit the Registry of the Tribunal by facsimile a Request for the prescriptio of provisional measures under article 290, paragraph 5, of the Conventio in the dispute between New Zeland and Japan concerning souther bluefin tuna;

3. *Whereas* a certified copy of the Request was sent the same da by the Registrar of the Tribunal to the Minister for Foreign Affairs o Japan, Tokyo, and also in care of the Ambassador of Japan to Germany

4. *Whereas* the original of the Request and documents in suppor were filed on 4 August 1999;

5. *Whereas*, on 30 July 1999 at 2:30 p.m., Australia filed with the Registry by facsimile a Request for the prescription of provisional measures under article 290, paragraph 5, of the Convention in the dispute between Australia and Japan concerning soughern bluefin tuna;

6. *Whereas* a certified copy of the Request was sent the same day by the Registrar to the Minister for Foreign Affairs of Japan, Tokyo, and also in care of the Ambassador of Japan to Germany;

7. *Whereas* the orginal of the Request and documents in support were filed on 5 August 1999;

8. *Whereas*, on 30 July 1999, the Registrar was informed of the appointment of Mr. Timothy Bruce Caughley, International Legal Adviser and Director of the Legal Division of the Ministry of Foreign Affairs and Trade, as Agent for New Zealand, and Mr. William McFadyen Campbell, First Assistant Secretary, Office of International Law, Attorney-General's Department, as Agent for Australia; and of the appointment of Mr. Kazuhiko Togo, Director General of the Treaties Bureau, Ministry of Foreign Affairs of Japan, as Agent for Japan on 2 August 1999;

9. *Whereas* the Tribunal does not include upon the bench a judge of the nationality of Australia or of New Zealand;

10. *Whereas*, pursuant to article 17 of the Statute, Australia and New Zealand are each entitled to choose a judge *ad hoc* to participate as a member of the Tribunal in the proceedings in the respective cases;

11. *Whereas* Australia and New Zealand in their Requests informed the Tribunal that, as parties in the same interest, they had jointly nominated Mr. Ivan Shearer AM, Challis Professor of International Law, University of Sydney, Australia, as judge *ad hoc*;

12. *Whereas*, by a letter dated 6 August 1999, the Agent for Japan was informed, in accordance with article 19 of the Rules, of the intention of Australia and New Zealand to choose Mr. Shearer as judge *ad hoc* and was invited to furnish any observations by 10 August 1999;

13. *Whereas*, since no objection to the choice of Mr. shearer as judge *ad hoc* was raised by Japan and none appeared to the Tribunal itself, Mr. Shearer was admitted to participate in the proceedings after having made the solemn declaration required under article 9 of the Rules in relation to each of the two cases at a public sitting of the Tribunal held on 16 August 1999;

14. *Whereas*, after having ascertained the views of the parties, the President of the Tribunal, by separate Orders of 3 August 1999 with respect to each Request, fixed 18 August 1999 as the date for the opening

of the hearing, notice of which was communicated forthwith to t parties;

15. *Whereas,* the Secreatary-General of the United Nations wa notified of the Requests by a letter dated 30 July 1999, and States Parti to the Convention were notified, in accordance with article 24, paragrap 3, of the Statute, by a note verbale from the Registrar dated 4 Augu 1999;

16. *Whereas,* additional documents were submitted on 5, 12 and 1 August 1999 by Australia, copies of which were transmitted in eac case to the other parties;

17. *Whereas,* by a letter dated 6 August 1999, the parties wer informed that the President, acting in accordance with article 47 of th Rules and with the consent of Australia and New Zealand, had directe that Japan might file a single Statement in Response by 9 August 1999

18. *Whereas*, on 9 August 1999, Japan filed with the Registry it Statement in Response, which was transmitted *via* electronic mail to th Agent for Australia on the same date and on 10 August 1999 to th Agent for New Zeland; certified copies of the Statement in Response were transmitted by courier to the Agents for Australia and New Zealand on 10 August 1999;

19. *Whereas*, in accordance with article 68 of the Rules, the Tribunal held initial deliberations on 16 and 17 August 1999 and noted the points and issues it wished the parties specially to address;

20. *Whereas*, at a meeting with the representives of the parties on 17 August 1999, the President ascertained the views of the parties regarding the procedure for the hearing and, in accordance with article 76 of the Rules, informed them of the points and issues which the Tribunal wished the parties specially to address;

21. *Whereas*, priör to the opening of the hearing, the parties submitted documents pursuant to paragraph 14 of the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal; and information regrading an expert to be called by Australia before the Tribunal pursuant to article 72 of the Rules;

22. *Whereas*, pursuant to article 67, paragraph 2, of the Rules, copies of the Requests and the Statement in Response and the documents annexed thereto were made accessible to the public on the date of the opening of the oral proceedings;

23. *Whereas,* oral statements were presented at five public sittings held on 18,19 and 20 August 1999 by the following:

On behalf of Australia and

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|---|---|
| New Zealand: | Mr. Timothy Caughley, Agent and Counsel for New Zealand, |
| | Mr. William Campbell, Agent and Counsel for Australia, Mr. Dary Williams AM QC MP, Attorney-General of the Commonwealth of Australia, Counsel for Australia, |
| | Mr. Billl Mansfield, Counsel and Advocate for New Zealand, |
| | Mr. James Crawford SC, Counsel for Australia, |
| | Mr. Henry Burmester QC, Counsel for Australia; |
| On behalf of Japan: | Mr. Kazuhiko Togo, Agent, |
| | Mr. Robert T. Greig, Counsel, |
| | Mr. Nisuke Ando, Counsel; |

24. *Whereas* in the course of the oral statements a number of maps, charts, tables, graphs and extracts from documents were presented, including displays on computer monitors;

25. *Whereas*, on 18 August 1999, Mr. John Beddington BSc (Econ) MSc PhD, Director, T.H. Huxley School of Environment, Earth Sciences and Engineering, Imperial College of Science, Technology and Medicine, London, United Kingdom, was called as expert by New Zeland and Australia (examined on the *voir dire* by Mr. Matthew Slater, Advocate for Japan), examined by Mr. Crawford and crossexamined by Mr. Slater;

26. *Whereas*, on 19 and 20 August 1999, the parties submitted written responses to certain points and issues which the Tribunal wished them specially to address;

27. *Whereas*, during the hearing on 20 August 1999, the Tribunal addressed questions to the parties, responses to which were provided in writing on the same date;

28. *Whereas*, in the Notification of 15 July 1999 and the attached Statement of Claim, New Zealand alleged that Japan had failed to comply with its obligation to cooperate in the conservation of the southern bluefin tuna stock by, *inter alia*, undertaking unilateral experimental fishing for

southern bluefin tuna in 1998 and 1999 and, accordingly, had requ
the arbitral tribunal to be constituted under Annex VII (hereinafter
arbitral tribunal") to adjudge and declare:

1. *That Japan has breached its obligations under Articles 64 and to 119 of UNCLOS [United Nations Convention on the Law o Sea] in relation to the conservation and management of the [southern bluefin tuna] stock, including by:*

   *(a) failing to adopt necessary conservation measures for its nati fishing on the high seas so as to maintain or restore the stock to levels which can produce the maximum sustainable y as required by Article 119 and contrary to the obligation in A 117 to take necessary conservation measures for its nation*

   *(b) carrying out unliateral experimental fishing in 1988 and which has or will result in SBT being taken by Japan over above previously agreed Commission [Commission for Conservation of Southern Bluefin Tuna] national allocatio*

   *(c) taking unilateral action contrary to the rights and interes New Zealand as a coastal State as recognised in Article 11 and allowing its nationals to catch additional SBT in the co of experimental fishing in a way which discriminates against Zeland fishermen contrary to Article 119 (3);*

   *(d) failing in good faith to co-operte with New Zealand with a to ensuring the conservation of SBT, as required by Article 6 UNCLOS;*

   *(e) otherwise failing in its obligations under UNCLOS in respe the conservation and management of SBT, having regard to requirements of the precautionary principle.*

2. *That, as a consequence of the aforesaid breaches of UNCLOS, Ja shall:*

   *(a) refrain from authorising or conducting any further experme fishing for SBT without the agreement of New Zealand Australia;*

   *(b) negotiate and co-operate in good faith with New Zeal including through the Commission, with a view to agreeing fu conservation measures and TAC [total allowable catch] for necessary for maintaining and restoring the SBT stock to le which can produce the maximum sustainable yield;*

   *(c) ensure that its nationals and persons subject to its jurisdic*

*do not take any SBT which would lead to a total annual catch of SBT above the amount of the previous national allocations agreed with New Zealand and Australia until such time as agreement is reached with those States on an alternative level of catch; and*

*(d) restrict its catch in any given fishing year to its national allocation as last agreed in the Commission subject to the reduction of such catch by the amount of SBT taken by Japan in the course of its unilateral experimental fishing in 1998 and 1999.*

*3. That Japan pay New Zealand's costs of the proceedings:*

29. *Whereas*, in the Notification of 15 July 1999 and the attached Statement of Claim, Australia alleged that Japan had failed to comply with its obligation to cooperate in the conservation of the southern bluefin tuna stock by, *inter alia*, undertaking unilateral experimental fishing for southern bluefin tuna in 1998 and 1999 and, accordingly, had requested the arbitral tribunal to adjudge and declare:

*(1) That Japan has breached its obligations under Articles 64 and 116 to 119 of UNCLOS in relation to the conservation and management of the SBT stock, including by:*

*(a) failing to adopt necessary conservation measures for its nationals fishing on the high seas so as to maintain or restore the SBT stock to levels which can produce the maximum sustainable yield, as required by Article 119 of UNCLOS and contrary to the obligation in Article 117 to take necessary conservation measures for its nationals;*

*(b) carrying out unilateral experimental fishing in 1998 and 1999 which has or will result in SBT being taken by Japan over and above previously agreed Commission national allocations;*

*(c) taking unilateral action contrary to the rights and interests of Australia as a coastal state as recognised in Article 116(b) and allowing its nationals to catch additional SBT in the course of experimental fishing in a way which discriminates against Australian fishermen contrary to Article 119 (3);*

*(d) failing in good faith to co-operate with Australia with a view to ensuring the conservation of SBT, as required by Article 64 of UNCLOS; and*

*(e) otherwise failing in its obligations under UNCLOS in respect of the conservation and management of SBT, having regard to the requirements of the precautionary principle.*

(2) *That, as a consequence of the aforesaid breaches of UNCLOS, Japa shall:*

(a) *refrain from authorising or conducting any further experiment fishing for SBT without the agreement of Australia and Ne Zealand;*

(b) *negotiate and co-operate in good faith with Australia, includin through the Commission, with a view to agreeing futur conservation measures and TAC for SBT necessary fo maintaining and restoring the SBT stock to levels which ca produce the maximum sustainable yield;*

(c) *ensure that its nationals and persons subject to its jurisdictio do not take any SBT which would lead to a total annual catch o SBT by Japan above the amount of the previous nationa allocation for Japan agreed with Australia and New Zealan until such time as agreement is reached with those States on a alternative level of catch; and*

(d) *restrict its catch in any given fishing year to its national allocatio as last agreed in the Commission, subject to the reduction o such catch for the current year by the amount of SBT taken b Japan in the course of its unilateral experimental fishing in 199 and 1999.*

(3) *That Japan pay Australia's costs of the proceedings;*

30. *Whereas*, in their Notifications of 15 July 1999, Australia an New Zealand requested that Japan agree to certain provisional measure with respect to the disputes pending the constitution of the arbitra tribunal or agree that the question of provisional measures be forthwit submitted to the Tribunal and furthermore reserved the right, if Japa did not so agree within two weeks, immediately on the expiry of th two-week period and without further notice to request the Tribunal t prescribe the provisional measures;

31. *Whereas* the provisional measures requested by New Zealand i the Request to the Tribunal dated 30 July 1999 are as follows:

(1) *that Japan immediately cease unilateral experimental fishing fo SBT;*

(2) *that Japan restrict its catch in any given fishing year to its nationa allocation as last agreed in the Commission for the Conservatio of Southern Bluefin Tuna ("the Commission'), subject to th reduction of such catch by the amount of SBT taken by Japan i the course of its unilateral experimental fishing in 1999;*

(3) *that the parties act consistently with the precautionary principle in fishing for SBT pending a final settlement of the dispute;*

(4) *that the parties ensure that no action of any kind is taken which might aggravate, extend or render more difficult of solution the dispute submitted to the Annex VII Arbitral Tribunal; and*

(5) *that the parties ensure that no action is taken which might prejudice their respective rights in respect of the carrying out of any decision on the merits that the Annex VII Arbitral Tribunal may render;*

32. *Whereas* the provisional measures requested by Australia in the Request to the Tribunal dated 30 July 1999 are as follows:

(1) *that Japan immediately cease unilateral experimental fishing for SBT;*

(2) *that Japan restrict its catch in any given fishing year to its national allocation as last agreed in the Commission for the Conservation of Southern bluefin Tuna ('the Commission'), subject to the reduction of such catch by the amount of SBT taken by Japan in the course of its unilateral experimental fishing in 1998 and 1999;*

(3) *that the parties act consistently with the precautionary principle in fishing for SBT pending a final settlement of the dispute;*

(4) *that the parties ensure that no action of any kind is taken which might aggravate, extend or render more difficult of solution the dispute submitted to the Annex VII Arbitral Tribunal; and*

(5) *that the parties ensure that no action is taken which might prejudice their respective rights in respect of the carrying out of any decision on the merits that the Annex VII Arbitral Tribunal may render;*

33. *Whereas* submissions and arguments presented by Japan in its Statement in Response include the following:

> *Australia and New Zealand must satisfy two conditions before a tribunal constituted pursuant to Annex VII would have jurisdiction over this dispute such that this Tribunal may entertain a request for provisional measures pursuant to Article 290 (5) of UNCLOS pending constitution of such an Annex VII tribunal. First, the Annex VII tribunal must have prima facie jurisdiction. This means among other things that the dispute must concern the interpretation or application of UNCLOS and not some other international agreement. Second, Australia and New Zealand must have attempted in good faith to reach a settlement in accordance with the provisions of UNCLOS Part XV, Section 1.*

*Since Australia and New Zealand have satisfied neither condition, an Annex VII tribunal would not have prima facie jurisdiction and accordingly this Tribunal is without authority to prescribe any provisional measures.*

*In the event that the Tribnal determines that this matter is properly before it and an Annex VII tribunal would have prima facie jurisdiction, then, pursuant to ITLOS [International Tribunal for the Law of the Sea] Rules Article 89 (5), Japan respectfully requests that the Tribunal grant Japan provisional relief in the form of prescribing that Australia and New Zealand urgently and in good faith recommence negotiations with Japan for a period of six months to reach a consensus on the outstanding issues between them, including a protocol for a continued EFP [experimental fishing programme] and the determination of a TAC and national allocations for the year 2000. Should the parties not reach a consensus within six months following the resumption of these negotiations, the Tribunal should prescribe that any remaining disagreements would be, consistent with Parties' December 1998 agreements and subsequent Terms of Reference to the EFPWG [experimental fishing programme working group]..., referred to the panel of independent scientists for their resolution.*

*The ... Statement of Facts and the history of negotiations between Australia, New Zealand and Japan concerning conservation of SBT, chronicles the bad faith exhibited by Australia and New Zealand in terminating consultations and negotiations over the terms of a joint experimental fishing program and their rash resort to proceedings under UNCLOS despite the absence of any controversy thereunder and the failure to exhaust the amicable provisions for dispute resolution that Part XV mandates be fully utilized. Accordingly, this Tribunal should require Australia and New Zealand to fulfil their obligations to continue negotiations over this scientific dispute.*

**... Submissions**

*Upon the foregoing Response and the Annexes hereto, the Government of Japan submits that the Request for provisional measures by Australia and New Zealand should be denied and Japan's counter-request for provisional measures should be granted;*

34. *Whereas* Australia and New Zealand, in their final submissions at the public sitting held on 20 August 1999, requested the prescription by the Tribunal of the following provisional measures:

*(1) that Japan immediately cease unilateral experimental fishing for SBT;*

*(2) that Japan restrict its catch in any given fishing year to its national allocation as last agreed in the Commission for the Conservation of Southern Bluefin Tuna ('the Commission'), subject to the reduction of such catch by the amount of SBT taken by Japan in the course of its unilateral experimental fishing in 1998 and 1999;*

*(3) that the parties act consistently with the precautionary principle in fishing for SBT pending a final settlement of the dispute;*

*(4) that the parties ensure that no action of any kind is taken which might aggravate, extend or render more difficult of solution the dispute submitted to the Annex VII Arbitral Tribunal; and*

*(5) that the parties ensure that no action is taken which might prejudice their respective rights in respect of the crying out of any decision on the merits that the Annex VII Arbitral Tribunal may render;*

35. *Whereas*, at the public sitting held on 20 August 1999, Japan presented its final submissions as follows:

*First, the request of Australia and New Zealand for the prescription of provisional measures should be denied.*

*Second, despite all the submissions made by Japan, in the event that the Tribnal were to determine that this matter is properly before it and an Annex VII tribunal would have prima facie jurisdiction and that the Tribunal were to determine that it could and should prescribe provisional measures, than, pursuant to ITLOS Rules Article 89(5), the International Tribunal should grant provisional measures in the form of prescribing that Australia and New Zealand urgently and in good faith recommence negotiations with Japan for a period of six months to reach a consensus on the outstanding issues between them, including a protocol for a continued EFP and the determination of a TAC and national allocations for the year 2000. The Tribunal should prescribe that any remaining disagreements would be, consisent with the Parties' December 1998 agreement and subsequent Terms of Reference to the EFP Working Group, referred to the panel of independent scientists for their resolution.*

*should the parties not reach consensus within six months following the resumption of these negotiations;*

36. *Considering* that, pursuant to articles 286 and 287 of t Convention, Australia and New Zealand have both instituted proceedin before the arbitral tribunal against Japan in their disputes concerni southern bluefin tuna;

37. *Considering* that Australia and New Zealand on 15 July 19 notified Japan of the submission of the disputes to the arbitral tribun and of the Requests for provisional measures;

38. *Considering* that on 30 July 1999, after the expiry of the tim limit of two weeks provided for in article 290, paragraph 5, of th Convention, Australia and New Zealand submitted to the Tribun Requests for provisional measures;

39. *Considering* that article 290, paragraph 5, of the Conventio provides in the relevant part that:

*Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea... may prescribe, modify or revoke provisional mesures in accordance with this article if it considers that prima facie the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires;*

40. *Considering* that, before prescribing provisional measures und article 290, paragraph 5, of the Convention, the Tribunal must satis itself that *prima facie* the arbitral tribunal would have jurisdiction;

41. *Considering* that Australia and New Zealand have invoked the basis of jurisdiction of the arbitral tribunal article 288, paragraph of the Convention which reads as follows:

*A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part;*

42. *Considering* that Japan maintains that the disputes are scientif rather than legal;

43. *Considering* that, in the view of the Tribunal, the difference between the parties also concern points of law;

44. *Considering* that, in the view of the Tribunal, a dispute is a "disagreement on a point of law or fact, a conflict of legal views or of interests" (*Mavrommatis Palestine Concessions*, Judgment *No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11), and "[i]t must be shown that the claim of one party is positively opposed by the other" *(South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962,* p.328);

45. *Considering* that Australia and New Zealand allege that Japan, by unilaterally designing and undertaking an experimental fishing programme, has failed to comply with obligations under articles 64 and 116 to 119 of the Convention on the Law of the Sea, with provisions of the Convention for the Conservation of Southern Bluefin Tuna of 1993 (hereinafter "the Convention of 1993") and with rules of customary international law;

46. *Considering* that Japan maintains that the dispute concerns the interpretation or implementation of the Convention of 1993 and does not concern the interpretation or application of the Convention on the Law of the Sea;

47. *Considering* that Japan denies that it has failed to comply with any of the provisions of the Convention on the Law of the Sea referred to by Australia and New Zealand;

48. *Considering* that, under article 64, read together with articles 116 to 119, of the Convention, States Parties to the Convention have the duty to cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of highly migratory species;

49. *Considering* that the list of highly migratory species contained in Annex I to the Convention includes southern bluefin tuna: *thunnus maccoyii*;

50. *Considering* that the conduct of the parties within the Commission for the Conservation of Southern Bluefin Tuna established in accordance with the Convention of 1993, and in their relations with non-parties to that Convention, is relevant to an evaluation of the extent to which the parties are in compliance with their obligations under the Convention on the Law of the Sea;

51. *Considering* that the fact that the Convention of 1993 applies between the parties does not exclude their right to invoke the provisions of the Convention on the Law of the Sea in regard to the conservation and management of southern bluefin tuna;

52. *Considering* that, in the view of the Tribunal, the provisions of the Convention on the Law of the Sea invoked by Australia and New

Zealand appear to afford a basis on which the jurisdiction of the arbitral tribunal might be founded;

53. *Considering* that Japan argues that recourse to the arbitral tribunal is excluded because the Convention of 1993 provides for a dispute settlement procedure;

54. *Considering* that Australia and New Zealand maintain that they are not precluded from having recourse to the arbitral tribunal since the Convention of 1993 does not provide for a compulsory dispute settlement procedure entailing a binding decision as required under article 282 of the Convention on the Law of the Sea;

55. *Considering* that, in the view of the Tribunal, the fact that the Convention of 1993 applies between the parties does not preclude recourse to the procedures in Part XV, section 2, of the Convention on the Law of the Sea;

56. *Considering* that Japan contends that Australia and New Zealand have not exhausted the procedures for amicable dispute settlement under Part XV, section 1, of the Convention, in particular article 281, through negotiations or other agreed peaceful means, before submitting the disputes to a procedure under Part XV, section 2, of the Convention;

57. *Considering* that negotiations and consultations have taken place between the parties and that the records show that these negotiations were considered by Australia and New Zealand as being under the Convention of 1993 and also under the Convention on the Law of the Sea;

58. *Considering* that Australia and New Zealand have invoked the provisions of the Convention in diplomatic notes addressed to Japan in respect of those negotiations;

59. *Considering* that Australia and New Zealand have stated that the negotiations had terminated;

60. *Considering* that, in the view of the Tribunal, a State Party is not obliged to pursue procedures under Part XV, section 1, of the Convention when it concludes that the possibilities of settlement have been exhausted;

61. *Considering* that, in the view of the Tribunal, the requirements for invoking the procedures under Part XV, section 2, of the Convention have been fulfilled;

62. *Considering* that, for the above reasons, the Tribunal finds that the arbitral tribunal would *prima facie* have jurisdiction over the disputes;

63. *Considering* that, according to article 290, paragraph 5, of the Convention, provisional measures may be prescribed pending the constitution of the arbitral tribunal if the Tribunal considers that the

urgency of the situation so requires;

64. *Considering*, therefore, that the Tribunal must decide whether provisional measures are required pending the constitution of the arbitral tribunal;

65. *Considering* that, in accordance with article 290, paragraph 5, of the Convention, the arbitral tribunal, once constituted, may modify, revoke or affirm any provisional measures prescribed by the Tribunal;

66. *Considering* that Japan contends that there is no urgency for the prescription of provisional measures in the circumstances of this case;

67. *Considering* that, in accordance with article 290 of the Convention, the Tribunal may prescribe provisional measures to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment;

68. *Considering* that Australia and New Zealand contend that by unilaterally implementing an experimental fishing programme Japan has violated the rights of Australia and New Zealand under articles 64 and 116 to 119 of the Convention;

69. *Considering* that Australia and New Zealand contend that further catches of southern bluefin tuna, pending the hearing of the matter by an arbitral tribunal, would cause immediate harm to their rights;

70. *Considering* that the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment;

71. *Considering* that there is no disagreement between the parties that the stock of southern bluefin tuna is severely depleted and is at its historically lowest levels and that this is a cause for serious biological concern;

72. *Considering* that Australia and New Zealand contend that, by unilaterally implementing an experimental fishing programme, Japan has failed to comply with its obligation under articles 64 and 118 of the Convention, which require the parties to cooperate in the conservation and management of the southern bluefin tuna stock, and that the actions of Japan have resulted in a threat to the stock;

73. *Considering* that Japan contends that the secientific evidence available shows that the implementation of its experimental fishing programme will cause no further threat to the southern bluefin tuna stock and that the experimental fishing programme remains necessary to reach a more reliable assessment of the potential of the stock to recover;

74. *Considering* that Australia and New Zealand maintain that the

scientific evidence available shows that the amount of southern bluef tuna taken under the experimental fishing programme could endang the existence of the stock;

75. *Considering* that the Tribunal has been informed by the parti that commercial fishing for southern bluefin tuna is expected to contin throughout the remainder of 1999 and beyond;

76. *Considering* that the catches of non-parties to the Convention 1993 have increased considerably since 1996;

77. *Considering* that, in the view of the Tribunal, the parties shou in the circumstances act with prudence and caution to ensure th effective conservation measures are taken to prevent serious harm to th stock of southern bluefin tuna;

78. *Considering* that the parties should intensify their efforts t cooperate with other participants in the fishery for southern bluefin tun with a view to ensuring conservation and promoting the objective o optimum utilization of the stock;

79. *Considering* that there is scientific uncertainty regarding measure to be taken to conserve the stock of southern bluefin tuna and that ther is no agreement among the parties as to whether the conservatio measures taken so far have led to the improvement in the stock o southern bluefin tuna;

80. *Considering* that, although the Tribunal cannot conclusivel assess the scientific evidence presented by the parties, it finds tha measures should be taken as a matter of urgency to preserve the right of the parties and to avert further deterioration of the southern bluefi tuna stock;

81. *Considering* that, in the view of the Tribunal, catches taken withi the framework of any experimental fishing programme should not resul in total catches which exceed the levels last set by the parties for each o them, except under agreed criteria;

82. *Considering* that, following the pilot programme which took plac in 1998, Japan's experimental fishing as currently designed consists o three annual programmes in 1999, 2000 and 2001;

83. *Considering* that the Tribunal has taken note that, by the statemen of its Agent before the Tribunal on 20 August 1999, Japan made a "clea commitment that the 1999 experimental fishing programme will end b 31 August";

84. *Considering*, however, that Japan has made no commitmen regarding any experimental fishing programmes after 1999;

85. *Considering* that, for the above reasons, in the view of the Tribunal, provisional measures are appropriate under the circumstances;

86. *Considering* that, in accordance with article 89, paragraph 5, of the Rules, the Tribunal may prescribe measures different in whole or in part from those requested;

87. *Considering* the binding force of the measures prescribed and the requirement under article 290, paragraph 6, of the Convention that compliance with such measures be prompt;

88. *Considering* that, pursuant to article 95, paragraph 1, of the Rules, each party is required to submit to the Tribunal a report and information on compliance with any provisional measures prescribed;

89. *Considering* that it may be necessary for the Tribunal to request further information form the parties on the implementation of provisional measures and that it is appropriate that the President be authorized to request such information in accordance with article 95, paragraph 2, of the Rules;

90. *For these reasons,*

THE TRIBUNAL,

1. *Prescribes*, pending a decision of the arbitral tribunal, the following measures:

By 20 votes to 2,

(a) Australia, Japan and New Zealand shall each ensure that no action is taken which might aggravate or extend the dispute submitted to the arbitral tribunal;

IN FAVOUR: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, WARIOBA, LAING, TREVES, MARSIT, NDIAYE; *Judge* ad hoc SHEARER;

AGAINST : *Judges* VUKAS, EIRIKSSON.

By 20 votes to 2,

(b) Australia, Japan and New Zealand shall each ensure that no action is aken which might prejudice the carrying out of any decision on the merits which the arbitral tribunal may render;

IN FAVOUR: *President* MENSAH; *Vice-President* WOLFRUM; *Jud* ZHAO, CAMINOS, MAROTTA RANGEL, YANKC YAMAMOTO, KOLODKIN, PARK, BAMELA ENC NELSON, CHANDRASEKHARA RAO, AK ANDERSON, WARIOBA, LAING, TREVES, MARS NDIAYE; *Judge* ad hoc SHEARER;

AGAINST: *Judges* VUKAS, EIRIKSSON.

By 18 votes to 4,

(c) Australia, Japan and New Zealand shall ensure, unless they agree otherwise, that their annual catches do not exceed the annual national allocations at the levels last agreed by the parties of 5,265 tones, 6,065 tonnes and 420 tonnes, respectively; in calculating the annual catches for 1999 and 2000, and without prejudice to any decision of the arbitral tribunal, account shall be taken of the catch during 1999 as part of an experimental fishing programme;

IN FAVOUR: *President* MENSAH; *Vice-President* WOLFRUM; *Judg* CAMINOS, MAROTTA RANGEL, YANKO KOLODKIN, PARK, BAMELA ENGO, NELSO CHANDRASEKHARA RAO, AKL, ANDERSO LAING, TREVES, MARSIT, EIRIKSSON, NDIAY *Judge* ad hoc SHEARER;

AGAINST: *Judges* ZHAO, YAMAMOTO, VUKAS, WARIOBA.

By 20 votes to 2,

(d) Australia, Japan and New Zealand shall each refrain from conducting an experimental fishing programme involving the taking of a catch of southern bluefin tuna, except with the agreement of the other parties or unless the experimental catch is counted against its annual national allocation as prescribed in subparagraph (c);

IN FAVOUR: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; *Judge* ad hoc SHEARER;

AGAINST: *Judges* YAMAMOTO, VUKAS.

By 21 votes to 1,

(e) Australia, Japan and New Zealand should resume negotiations without delay with a view to reaching agreement on measures for the conservation and management of southern bluefin tuna;

IN FAVOUR: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; *Judge* ad hoc SHEARER;

AGAINST: *Judge* VUKAS.

By 20 votes to 2,

(f) Australia, Japan and New Zealand should make further efforts to reach agreement with other States and fishing entities engaged in fishing for southern bluefin tuna, with a view to ensuring conservation and promoting the objective of optimum utilization of the stock;

IN FAVOUR: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; *Judge* ad hoc SHEARER;

AGAINST: *Judges* VUKAS, WARIOBA.

By 21 votes to 1,

2. *Decides* that each party shall submit the initial report referred to in article 95, paragraph 1, of the Rules not later than 6 October 1999, and authorizes the President of the Tribunal to request such further reports and information as he may consider appropriate after that date;

IN FAVOUR: *President* MENSAH; *Vice-President* WOLFRUM; *Judge* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO NELSON, CHANDRASEKHARA RAO, AKL ANDERSON, WARIOBA, LAING, TREVES, MARSIT EIRIKSSON, NDIAYE; *Judge ad hoc* SHEARER;

AGAINST: *Judge* VUKAS.

By 21 votes to 1.

3. *Decides*, in accordance with article 290, paragraph 4, of the Convention and article 94 of the Rules, that the provisional measures prescribed in this Order shall forthwith be notified by the Registrar through appropriate means to all States Parties to the Conventation participating in the fishery for southern bluefin tuna.

IN FAVOUR: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO NELSON, CHANDRASEKHARA RAO, AKL ANDERSON, WARIOBA, LAING, TREVES, MARSIT EIRIKSSON, NDIAYE; *Judge* ad hoc SHEARER;

AGAINST: *Judge* VUKAS.

Done in English and in French, the English text being authoritative, in the Free and Hanseatic City of Hamburg, this twenty-seventh day of August, One Thousand Nine Hundred and Ninety-Nine, in four copies, one of which will be placed in the

archives of the Tribunal and the others transmitted to the Government of New Zealand, the Government of Australia and the Government of Japan, respectively.

Thomas A. Mensah,
President.

Gritakumar E. Chitty.
Registrar.

Vice-president WOLFRUM, Judges CAMINOS, MAROTTA RANGEL, YANKOV, ANDERSON and EIRIKSSON append a joint declaration to the Order of the Tribunal.*

Judge WARIOBA appends a declaration to the Order of the Tribunal.*

Judges LAING and TREVES append spearate opinions to the Order of the Tribunal.*

Judges YAMAMOTO and PARK append a joint separate opinion to the Order of the Tribunal.*

Judge *ad hoc* SHEARER appends a separate opinion to the Order of the Tribunal.*

Judges VUKAS, EIRIKSSON append dissenting Opinions to the Order of the Tribunal.*

* These have been reproduced in the next issue of the IJIL.

# OFFICIAL DOCUMENTS

## THIRD UNITED NATIONS CONFERENCE ON THE EXPLORATION AND PEACEFUL USES OF OUTER SPACE (UNISPACE-III) JULY 19, 1999-VIENNA

### STATEMENT BY THE HEAD OF INDIAN DELEGATION TO THE PLENARY OF UNISPACE-III*

Mr. President,

It gives me great pleasure to welcome you as President of this histori UN Conference of the Exploration and Peaceful Uses of Outer Space which is being held as the humanity is preparing to step into the nex millennium. I take this opportunity to express gratitude to al distinguished delegations of this august forum for the great honour done to you and to our country in electing you as the President. Your pas experience in reaching the benefits of outer space, as the leader of Indian space program and your proven record in steering the United Nations Committee on Peaceful Uses of Outer Space during the crucia preparatory phase of this conference augers well for the success of this important global event. My delegation also congratulates the other distinguished elected members of the Bureau whose experience and skills assure us of success of this conference.

Mr. President, on behalf of the Indian delegation and on my owr behalf, I would also like to commend the untiring efforts and pragmatic role of members of the Office for Outer Space Affairs, which is the Executive Secretariat for the Conference, and its dynamic Director, Dr N. Jasentuliyana, whose valuable experience and skills are assets to the Conference. On behalf of Government of India, I express my gratitude for the Government and the people of Austria, for hosting this Conference in the beautiful city of Vienna and extending us their warm hospitality which has become legendary.

Mr. President,

Since the last UN Conference on Space, which was held in 1982, the world has witnessed tremendous developments in different branches of

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* *Source* : General distribution at Vienna. Statement of Dr. K. Kasturirangan, Chairman Indian Space Research Organisation and Head of Indian Delegation to UNISPACE III.

space technology and its applications. Not merely that applications of space have expanded, but significantly, several more countries too have begun to participate in space endeavours and derive benefits from space technology. Above all, space provided a new perspective to humanity to view the Planet Earth as a total system. With its ability to integrate diverse aspects which affect quality of life, space inspires a new vision to humanity, unfolding new vistas for cooperations and progress towards a common destiny.

Notwithstanding such advances in technology and applications of the current century, humanity is still at cross roads, looking at the challenges for future assuming formidable proportions. Advances in technology while improving the pace of development, have also been increasing gaps in society—between the rich and the poor, the haves and the have-nots, and the educated and the deprived. As the technology changes are becoming more rapid, these gaps are also widening further. Such rapid advancements in technology and its applications, if not properly integrated into the entire structure of society, pose the danger of isolating large sections of society, thus making human civilization fragile.

Another major challenge before the humanity today is unsustainable exploitation of natural resources and consumption patterns, which if not reversed, can lead to irreversible damage to earth's environment and ecology. A paradigm shift of global values towards preservation of the integrity of Planet Earth and its environment, recognition its delicate balance and vulnerability to human action needs no emphasis. Global welfare goals, assuring a certain basic minimum quality of life to all sections of humanity should be the fundamental part of our vision for human development for the next century.

Mr. President,

The information revolution unleashed by the advances in space communications, microelectronics, optics and computer technologies provide unprecedented opportunities for access to knowledge and for rapid connectivity across the globe. However, use of these developments should be tempered with the goal of transitioning to greater social equity and cultural enrichment while pursuing the objectives of economic progress. In short, space should become a strong instrument to meet the challenge of the next millennium, namely, finding sustainable paths of development. No other technology has brought such an intense awareness of our interdependence on a global scale as the space technology. Indeed, few other technologies are as potent as space to

preserve that integrity and to assist humanity in overcoming the divisio through human connectivity at a global level and through enhanceme of awareness of 'the global sustainability' by continuously mirrori 'the state of health' of this planet. Therefore, the fundamental need f the global community at this juncture is to reiterate the value of space a common heritage of humankind and to reinforce its use for the bene of all countries, particularly the developing countries. Humankind c face the challenge of the next millennium only through the spread education, for which space technology serves as a powerful tool. T engine of economy can be accelerated through commercialisation, but has to be guided by the consciousness for bridging inequalities a ensuring certain basic minimum level of quality of life to the deprive sections of human society.

Mr. President,

India is one of those developing countries fortunate to have realise the potential of space technology from the very early times of evolutio of global space endeavours. Vision of India for Space is to make it strong tool for national development. Starting with the scientific pursui in the fields of astronomy and atmospheric sciences, and conductin unique sociological experiment like the Satellite Instructional Televisio Experiment (SITE), India has come a long way in developing multifaceted and multidimensional space program, which is self relia and applications driven, India now builds its own state of the art satelli systems INSAT and IRS, and has launch capabilities. Operational spac systems have been established for services in meteorolog telecommunications, television broadcasting and generating informatio for natural resources management. A wide range of applications whic are of societal value, have been developed. Remote Sensing data a integrated with other relevant data to derive information for assessin agricultural crop acreage and yields, monitoring of forests, reclaimin degraded lands, ground water, management of surface water, droug monitoring and assessment, flood mapping and damage assessment, lan use monitoring, coastal area managements. Through a program calle Integrated Mission for Sustainable Development, several of abov applications are integrated to derive comprehensive development pla at a watershed level, with the participation of local community. In th field of telecommunications, television broadcasting and meteorolog which is being served by geostationary satellites of Indian Nation Satellite System (INSAT), applications are diverse. It is worth mentionin that several development oriented programmes are implemented wit

focus on rural communications, search and rescue, cyclone disaster warning and educational services. One of the recent examples is adoption of tribal district of *Jhabua* in the central India where a major developmental communications project under evaluation, for assisting the local population in health, education, watershed development and empowerment of women. This societal focus Indian space program will continue and grow stronger in future.

Recognising that Space programs cannot be developed in isolation with other national institutions, strong linkages were developed with industry and academic institutions who participate in the national space program. In areas such as telecommunications, television and value added services for Remote Sensing, where commercialisation could lead to sustainable growth, economic returns and efficient services to users, facilitation for commercial services through private sector is undertaken. Antrix Corporation established by Department of Space also promotes commercial use of space and markets the Indian space capabilities in global markets.

International cooperation has been the hallmark of Indian space program, which endeavoured to enhance cooperation with several space agencies and institutions around the globe. Although the program itself is focused to meet national needs, the capacity created has been offered for the use of global community depending on their requirements either on a cooperative or commercial basis. The data from Indian remote sensing satellites are made accessible through a number of international receiving stations around the globe. Similarly through bilateral arrangements, the meteorological data gathered through INSAT are disseminated to other agencies. India also participates in all relevant international fora including the United Nations Committee on Peaceful Uses of Outer Space to promote, cooperation and orderly conduct of space activities. Indian Space Research Organization, as a member of the Committee on Earth Observation Satellites (CEOS), is contributing to evolve the Integrated Global Observing Strategy (IGOS), harmonizing the space and ground based observation systems for meeting the user requirements. Flight opportunities for the instruments developed by other agencies in Indian satellites are also provided. As a follow up of UNISPACE-82 Conference, India has been operating a programme for sharing experience in space with other developing countries, providing opportunities for training in space technology applications for persons from other developing nations.

Mr. President,

A major initiative taken by India to promote regional cooperation

was to host the Centre for Space Science and Technology Eduction
Asia and the Pacific, affiliated to the United Nations. The center provi
high quality education in the fields of remote sensing and GIS, satel
communications, meteorology and space sciences. With 14 countries
the Asia Pacific region along with the United Nations, governing a
managing the center, India provides technical and administrative supp
to the centre as a host country. Beginning in November 1995, this cen
has conducted 7 post-graduate courses, benefiting 126 students from
countries.

It may be noted that India has been substantially funding this Cent
This clearly demonstrates India's commitment to implement UNISPAC
82 recommendations. Mr. President, it is imperative that an appropria
mechanism is established within the United Nations system to ensu
that regular and adequate funding is made available. Such funding
essential for implementing, on a sustainable basis, the activities of t
Regional Centres for Space Science and Technology Education.

Mr. President,

India is also strongly committed to the role of United Nation in t
promotion of international cooperation in the field of space technolo
and is party to all treaties evolved by the United Nations. India is one
those countries, who believes that there is significant scope for enhanci
the benefits through international cooperation in this field. This can
strengthened by effectively using various existing fora in this field,
maintaining coordination among them and by constantly renewing the
roles in tune with the changes in the environment. I wish to bring to t
attention of distinguished delegates that under the aegis of UN-ESCA
the Second Ministerial Conference of Space Technology a
Applications will be held during November this year at New Delhi. Th
major event will review the status of the regional space applicatio
programme emerging out of the First Ministerial Conference, which w
held in September 1994 at Beijing, China. Mr. President, it will
pertinent to note that this ministerial conference will provide fi
opportunity to review the recommendations of UNISPACE-III at t
regional level and would also help in initiating specific actions with
Asia Pacific region through UN-ESCAP's regional programme.

Mr. President, viewing from all aspects, UNISPACE-III is going
be a unique event to debate on the theme "Space Benefits for Humani
in the 21st Century" . Projecting the vectorial progress in technolo
which enabled the human exploration of space in the last few decade
the human habitation in space is an inevitable prospect for future. 

space technology evolves in pace with several other associated technologies, space is bound to play a major role in the human kinds transition to deal with the future cognitive technical systems. As a backbone for information infrastructure, as an environment for new scientific pursuits, as a means for conveying the health of individuals and environment on a daily basis, as a medium for energy transfer. as a challenging frontier for new technology developments and as an arena for future habitation and industrialisation, space is going to significantly influence the destiny of humanity.

UNISPACE-III is a unique opportunity for the global community to enhance the role of space for global development and welfare. A concerted and cooperative approach to capacity building through education in the developing countries, a sound base for monitoring and protection of environment through cooperative space systems and a policy environment that would strike a balance between commercialism and means to meet societal priorities are important issues which affect large sections of humanity. In addition, international cooperation could be strengthened to address broader humanitarian needs such as disaster management where space technology can play an important role. The widespread development of peaceful uses of outer space by all countries will be possible only with unhindered access to technology and knowledge on a global basis. Global cooperation in this regard should be further strengthened to remove impediments to the access of technology, equipment, materials and knowledge for use in peaceful developmental activities.

Mr. President,

Indian delegation takes this opportunity to compliment the COPUOS and its Sub-committees for their excellent contributions for the preparatory process and looks forward to a comprehensive set of recommendations, meeting the goals laid down for the conference.

Thank you , Mr. President.

# MONTREAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES FOR INTERNATIONAL CARRIAGE BY AIR*

## 1999

## THE STATES PARTIES TO THIS CONVENTION

RECOGNIZING the significant contribution of the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed in Warsaw on 12 October 1929, hereinafter referred to as the "Warsaw Convention", and other related instruments to the harmonization of private international air law;

RECOGNIZING the need to modernize and consolidate the Warsaw Convention and related instruments;

RECOGNIZING the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution;

REAFFIRMING the desirability of an orderly development of international air transport operations and the smooth flow of passengers, baggage and cargo; in accordance with the principles and objectives of the Convention on International Civil Aviation done at Chicago on 7 December 1944;

CONVINCED that collective State action for further harmonization and codification of certain rules governing international carriage by air through a new Convention is the most adequate means of achieving an equitable balance of interests;

HAVE AGREED AS FOLLOWS:

## CHAPTER I

### General Provisions

### Article 1 - Scope of Application

1 This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.

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* *Source* : ICAO

2. For the purposes of this Convention, the expression *international carriage* means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. Carriage between two points within the territory of a Single Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention.

3. Carriage to be performed by several successive carriers is deemed, for the purposes of this Convention, to be one undivided carriage if it has been regarded by the parties as a single operation, whether it had agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series or a series of contracts is to be performed entirely within the territory of the same State.

4. This Convention applies also to carriage as set out in Chapter V, subject to the terms contained therein.

### Article 2 - Carriage Performed by State and Carriage of Postal Items

1. This Convention applies to carriage performed by the State or by legally constituted public bodies provided it falls within the conditions laid down in Article 1.

2. In the carriage of postal items the carrier shall be liable only to the relevant postal administration in accordance with the rules applicable to the relationship between the carriers and the postal administrations.

3. Except as provided in paragraph 2 of this Article, the provisions of this Convention shall not apply to the carriage of postal items.

## CHAPTER II

## Documentation and Duties of the Parties Relating to the Carriage of Passengers, Baggage and Cargo

### Article 3 - Passengers and Baggage

1. In respect of carriage of passengers an individual or collective document of carriage shall be delivered containing:

(*a*) an indication of the places of departure and destination;

(*b*) if the places of departure and destination are within the territo of a single State Party, one or more agreed stopping places being with the territory of another State, and indication of at least one such stoppi place.

2. Any other means which preserves the information indicated paragraph 1 may be substituted for the delivery of the document referr to in that paragraph. If any such other means is used, the carrier sh offer to deliver to the passenger a written statement of the informati so preserved.

3. The carrier shall deliver to the passenger a baggage identificati tag for each piece of checked baggage.

4. The passenger shall be given written notice to the effect th where this Convention is applicable it governs and may limit the liabili of carriers in respect of death or injury, and for destruction or loss of, damage to baggage, and for delay.

5. Non-compliance with the provisions of the foregoing paragrap shall not affect the existence or the validity of the contract of carriag which shall, nonetheless, be subject to the rules of this Conventi including those relating to limitation of liability.

**Article 4 - Cargo**

1. In respect of the carriage of cargo an air waybill shall be delivere

2. Any other means which preserves a record of the carriage to performed may be substituted for the delivery of an air waybill. If su other means are used, the carrier shall, if so requested by the consigno deliver to the consignor a cargo receipt permitting identification of t consignment and access to the information contained in the reco preserved by such other means.

**Article 5 - Contents of Air Waybill or Cargo Receipt**

The air waybill or the cargo receipt shall include:

(*a*) an indication of the places of departure and destination;

(*b*) if the places of departure and destination are within the territo of a single State Party, one or more agreed stopping places being with the territory of another State, an indication of at least one such stoppi place; and

(*c*) an indication of the nature and weight of the consignment.

### Article 6 - Document Relating to the Nature of Cargo

The Consignor may be required, if necessary to meet the formalities of customs, police and similar public authorities deliver a document indicating the nature of the cargo. This provision creates for the carrier no duty, obligation or liability resulting therefrom.

### Article 7 - Description of Air Waybill

1. The air waybill shall be made out by the consignor in three original parts.

2. The first part shall be marked "for the carrier", it shall be signed by the consignor. The second part shall be marked "for the consignee", it shall be signed by the consignor and by the carrier. The third part shall be signed by the carrier who shall hand it to the consignor after the cargo has been accepted.

3. The signature of the carrier and that of the consignor may be printed or stamped.

4. If, at the request of the consignor, the carrier makes out the air waybill, the carrier shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.

### Article 8 - Documentation of Multiple Packages

When there is more than one package.

(*a*) the carrier of cargo has the right to require the consignor to make out separate air waybill;

(*b*) the consignor has the right to require the carrier to deliver separate cargo receipts when the other means referred to in paragraph 2 of Article 4 are used.

### Article 9 - Non-compliance with Documentary Requirements

Non-compliance with the provisions of Articles 4 to 8 shall not affect the existence or the validity of the contract of carriage, which shall, none the less, be subject to the rules of this Convention including those relating to limitation of liability.

### Article 10 - Responsibility for Particulars of Documentation

1. The consignor is responsible for the correctness of the particulars and statements relating to the cargo inserted by it or on its behalf in the air waybill or furnished by it or on its behalf to the carrier for insertion in the cargo receipt or for insertion in the record preserved by the other

means referred to in paragraph 2 of Article 4. The foregoing shall als apply where the person acting on behalf of the consignor is also th agent of the carrier.

2. The consignor shall indemnify the carrier against all damage suffered by it, or by any other person to whom the carrier is liable, b reason of the irregularity, incorrectness or incompleteness of th particulars and statements furnished by the consignor or on its behalf.

3. Subject to the provisions of paragraphs 1 and 2 of this Article the carrier shall indemnify the consignor against all damage suffered b it, or by any other person to whom the consignor is liable, by reason o the irregularity, incorrectness or incompleteness of the particulars an statements inserted by the carrier or on its behalf in the cargo receipt o in the record preserved by the other means referred to in paragraph 2 o Article 4.

### Article 11 - Evidentiary Value of Documentation

1. The air waybill or the cargo receipt is *prima facie* evidence o the conclusion of the contract, of the acceptance of the cargo and of the conditions of carriage mentioned therein.

2. Any statements in the air waybill or the cargo receipt relating t the weight, dimensions and packing of the cargo, as well as those relating to the number of packages, are *prima facie* evidence of the facts stated those relating to the quantity, volume and condition of the cargo do no constitute evidence against the carrier except so far as they both have been, and are stated in the air waybill or the cargo apparent condition o the cargo.

### Article 12 - Right of Disposition of Cargo

1. Subject to its liability to carry out all its obligations under the contract of carriage, the consignor has the right to dispose of the carg by withdrawing it at the airport of departure or destination, or by stopping it in the course of the journey on any landing, or by calling for it to be delivered at the place of destination or in the course of the journey to a person other than the consignee originally designated, or by requiring i to be returned to the airport of departure. The consignor must not exercise this right of disposition in such a way as to prejudice the carrier or othe consignors and must reimburse any expenses occasioned by the exercise of this right .

2. If it is impossible to carry out the instructions of the consigno the carrier must so inform the consignor forthwith.

3. If the carrier carries out the instructions of the consignor for the disposition of the cargo without requiring the production of the part of the air waybill or the cargo receipt delivered to the latter, the carrier will be liable, without prejudice to its right of recovery from the consignor, for any damage which may be caused there by to any person who is lawfully in possession of that part of the air waybill or the cargo receipt.

4. The right conferred on the consignor ceases at the moment when that of the consignee begins in accordance with Article 13. Nevertheless, if the consignee declines to accept the cargo, or cannot be communicated with, the consignor resumes its right of disposition.

### Article 13 - Delivery of the Cargo

1. Except when the consignor has exercised its right under Article 12, the consignee is entitled, on arrival of the cargo the place of destination, to require the carrier to deliver the cargo to it, on payment of the charges due and on complying with the conditions of carriage.

2. Unless it is otherwise agreed, it is duty of the carrier to give notice to the consignee as soon as the cargo arrives.

3. If the carrier admits the loss of the cargo, or if the cargo has not arrived at expiration of seven days after the date on which it ought to have arrived, the consignee or consignor is entitled to enforce against the carrier the rights which flow from the contract of carriage.

### Article 14 - Enforcement of the Rights of Consignor and Consignee

The consignor and the consignee can respectively enforce all the right given to them by Articles 12 and 13, each in its own name, whether it is acting in its own interest or in the interest of another, provided that it carries out the obligations imposed by the contract of carriage.

### Article 15 - Relations of Consignor and Consignee or Mutual Relations of Third Parties

1. Articles 12, 13 and 14 do not affect either the relations of the consignor and the consignee with each other or the mutual relations of third parties whose rights are derived either from the consignor or from the consignee.

2. The provisions of Articles 12, 13 and 14 can only be varied by express provision in the air waybill or the cargo receipt.

### Article 16 - Formalities of Customs, Police or Other Public Authorities

1. The consignor must furnish such information and such documen as are necessary to meet the formalities of customs, police and any othe public authorities before the cargo can be delivered to the consignee The consignor is liable to the carrier for any damage occasioned by th absence, insufficiency or irregularity of any such information o documents, unless they damage is due to the fault of the carrier, it servants or agents.

2. The carrier is under no obligation to enquire into the correctnes or sufficiency of such information or documents.

## CHAPTER III

### Liability of the Carrier and Extent of Compensation for Damage

### Article 17 - Death and Injury of Passengers — Damage to Baggage

1. The carrier is liable for damage sustained in case of death o bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

2. The carrier is liable for damage sustained in case of destructio or loss of, or of damage to, checked baggage upon condition only tha the event which caused the destruction, loss or damage took place on board the aircraft or during any period within which the baggage was i the charge of the carrier. However, the carrier is not liable if and to the extent that the damage resulted from the inherent defect, quality or vice of the baggage. In the case of unchecked baggage, including persona items, the carrier is liable if the damage resulted from its fault or that o its servants or agents.

3. If the carrier admits the loss of the checked baggage, or if the checked baggage has not arrived at the expiration of twenty-one day after the date on which it ought to have arrived, the passenger is entitle to enforce against the carrier the rights which flow from the contract o carriage.

4. Unless otherwise specified, in this Convention the term "baggage means both checked baggage and unchecked baggage.

## Article 18 - Damage to Cargo

1. The carrier is liable for damage sustained in the event of the estruction or loss of, or damage to, cargo upon condition only that the vent which caused the damage so sustained took place during the arriage by air.

2. However, the carrier is not liable if and to the extent it proves hat the destruction, or loss of, or damage to, the cargo resulted from ne or more of the following:

(*a*) inherent defect, quality or vice of that cargo;

(*b*) defective packing of that cargo performed by a person other than the carrier or its servants or agents;

(*c*) an act of war or an armed conflict;

(*d*) an act of public authority carried out in connexion with the entry, exit or transit of the cargo.

3. The carriage by air within the meaning of paragraph 1 of this Article comprises the period during which the cargo is in the charge of the carrier.

4. The period of the carriage by air does not extend to any carriage by land, by sea or by inland waterway performed outside an airport. If, however, such carriage take place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air. If a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by another mode of transport is deemed to be within the period of carriage by air.

## Article 19 - Delay

The carrier is liable for damage occasioned by delay in the carriage by air of passengers. baggage, or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

## Article 20 - Exoneration

If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming

compensation, or the person from whom he or she derives his or h rights, the carrier shall be wholly or partly exonerated from its liabil to the claimant to the extent that such negligence or wrongful act omission caused or contributed to the damage. When by reason of dea or injury of a passenger compensation is claimed by a person other th the passenger, the carrier shall likewise be wholly or partly exonerat from its liability to the extent that it proves that the damage was caus or contributed to by the negligence or other wrongful act or omission that passenger. This Article applies to all the liability provisions in th Convention, including paragraph 1 of Article 21.

### Article 21 - Compensation in Case of Death or Injury of Passengers

1. For damages arising under paragraph 1 of Article 17 no exceeding 100 000 Special Drawing Rights for each passenger, th carrier shall not be able to exclude or limit its liability.

2. The carrier shall not be liable for damage arising under paragrap 1 of Article 17 to the extent that they exceed for each passenger 100 00 Special Drawing Rights if the carrier proves that:

(*a*) such damage was not due to the negligence or other wrongfu act or omission of the carrier or its servants or agents; or

(*b*) such damage was solely due to the negligence or other wrongfu act or omission of a third party.

### Article 22 - Limits of Liability

1. In the case of damage caused by delay as specified in Article 1 in the carriage of persons, the liability of the carrier for each passeng is limited to 4 150 Special Drawing Rights.

2. In the carriage of baggage the liability of the carrier in the cas of destruction, loss, damage or delay is limited to 1 000 Special Drawin Rights for each passenger unless the passenger has made, at the tim when the checked baggage was handed over to the carrier, a speci declaration of interest in delivery at destination and has paid supplementary sum if the case so requires. In that case the carrier will b liable to pay a sum not exceeding the declared sum, unless it proves th the sum is greater than the passenger's actual interest in delivery destination.

3. In the carriage of cargo, the liability of the carrier in the case destruction, loss, damage or delay is limited to a sum of 17 Speci Drawing Rights per kilogramme, unless the consignor has made, at th

ne when the package was handed over to the carrier, a special claration of interest in delivery at destination and has paid a pplementary sum if the case so requires. In that case the carrier will be ble to pay a sum not exceeding the declared sum, unless it proves that e sum is greater than the consignor's actual interest in delivery at stination.

4. In the case of destruction, loss, damage or delay of part of the rgo, or of any object contained therein, the weight to be taken into onsideration in determining the amount to which the carrier's liability limited shall be only the total weight of the package or packages oncerned. Nevertheless, when the destruction, loss, damage or delay f a part of the cargo, or of an object contained therein, loss, damage or elay of a part of the cargo, or of an object contained therein, affects the alue of other packages covered by the same air waybill, or the same eceipt or, if they were not issued, by the same record preserved by the ther means referred to in paragraph 2 of Article 4, the total weight of uch package or packages shall also be taken into consideration in etermining the limit of liability.

5. The foregoing provisions of paragraphs 1 and 2 of this Article hall not apply if it is proved that the damage resulted from an act or mission of the carrier, its servants or agents, done with intent to cause lamage or recklessly and with knowledge that damage would probably esult; provided that, in the case of such act or omission of a servant or gent, it is also proved that such servant or agent was acting within the cope of its employment.

6. The limits prescribed in Article 21 and in this Article shall not prevent the court from awarding, in accordance with its own law, in ddition, the whole or part of the court costs and of the other expenses f the litigation incurred by the plaintiff, including interest. The foregoing rovision shall not apply if the amount of the damages awarded, xcluding costs and other expenses of the litigation, does not exceed the um which the carrier has offered in writing to the plaintiff within a eriod of six months from the date of the occurrence causing the damage, r before the commencement of the action, if that is later.

## Article 23 - Conversion of Monetary Units

1. The sums mentioned in terms of Special Drawing Right in this Convention shall be deemed to refer to the Special Drawing Right as lefined by the International Monetary Fund. Conversion of the sums nto national currencies shall, in case of judicial proceedings, be made ccording to the value of such currencies in terms of the Special Drawing

Right at the date of judgment. The value of a national currency, in ter of the Special Drawing Right of a State Party which is a Member of International Monetary Fund, shall be calculated in accordance with method of valuation applied by the International Monetary Fund, in eff at the date of the judgment. for its operations and transactions. The va of a national currency, in terms of the Special Drawing Right, of a St Party which is not a Member of the International Monetary Fund, sh be calculated in a manner determined by that State.

2. Nevertheless, those States which are not Members of t International Monetary Fund and whose law does not permit t application of the provisions of paragraph 1 of this Article may, at t time of ratification or accession or at any time thereafter, declare that t limit of liability of the carrier prescribed in Article 21 is fixed at a sum [1,500,000] monetary units per passenger in judicial proceedings in the territories: [62,500] monetary units per passenger with respect paragraph 1 of Article 22; 15,000 monetary units per passenger wi respect to paragraph 2 of Article 22; and 250 monetary units p kilogramme with respect to paragraph 3 of Article 22. This moneta unity corresponds to sixty-five and a half milligrams of gold of millesim fineness nine hundred. These sums may be converted into the nation currency shall be made according to the law of the State concerned.

3. The calculation mentioned in the last sentence of paragraph 1 this Article and the conversion method mentioned in paragraph 2 of th Article shall be made in such manner as to express in the nation currency of the State Party as far as possible the same real value for t amounts in Articles 21 and 22 as would result from the application the first three sentences of paragraph 1 of this Article . States Parti shall communicate to the depositary the manner of calculation pursua to paragraph 1 of this Article, or the result of the conversion in paragra 2 of this Article as the case may be, when depositing an instrument ratification, acceptance, approval of or accession to this Convention a whenever there is a change in either.

### Article 24 - Review of Limits

1. Without prejudice to the provisions of Article 25 of th Convention and subject to paragraph 2 below, the limits of liabili prescribed in Articles 21, 22 and 23 shall be reviewed by the Deposita at five-year intervals, the first such review to take place at the end of t fifth year following the date of entry into force of this Convention, or the Convention does not enter into force by reference to an inflati factor which within five years of the date it is first open for signatu within the first year of its entry into force corresponds to the accumulat

te of inflation since the previous revision or in the first instance since e date of entry into force of the Convention. The measure of the rate of flation to be used in determining the inflation factor shall be the eighted average of the annual rates of increase or decrease in the onsumer Price Indices of the States whose currencies comprise the pecial Drawing Right mentioned in paragraph 1 of Article 23.

2. If the review referred to in the preceding paragraph concludes at the inflation factor has exceeded 10 per cent, the Depositary shall otify States Parties of a revision of the limits of liability. Any such evision shall become effective six months after its notification to the States Parties. If within three months after its notification to the State Parties a majority of the State Parties register their disapproval, the evision shall not become effective and the Depositary shall immediately otify all States Parties of the coming into force of any revision.

3. Notwithstanding paragraph 1 of this Article, the procedure referred to in paragraph 2 of this Article shall be applied at any time provided that one-third of the States Parties express a desire to that effect and upon condition that the inflation factor referred to in paragraph 1 has exceeded 30 percent since the previous revision or since the date of entry into force of this Convention if there has been no previous revision. Subsequent reviews using the procedure described in paragraph 1 of this Article will take place at five-year intervals starting at the end of the fifth year following the date of the reviews under the paragraph.

**Article 25 - Stipulation on Limits**

A carrier may stipulate that the contract of carriage shall be subject to higher limits of liability than those provide for in this Convention or to no limits of liability whatsoever.

**Article 26 - Invalidity of Contractual Provisions**

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention.

**Article 27 - Freedom to Contract**

Nothing contained in this Convention shall prevent the carrier from refusing to enter into any contract of carriage, from waiving any defences available under the Convention, or from laying down conditions

which do not conflict with the provisions of this Convention.

**Article 28 - Advance Payments**

In the case of aircraft accidents resulting in death or injury passengers, the carrier shall, if required by its national law, make advar payments without delay to a natural person or persons who are entit to claim compensation in order to meet the immediate economic nee of such persons. Such advance payment shall not constitute a recogniti of liability and may be offset against any amounts subsequently paid damages by the carrier.

**Article 29 - Basis of Claims**

In the carriage of passengers, baggage, and cargo, any action f damages, however founded, whether under this Convention or in contra or in tort or otherwise, can only be brought subject to the conditions a such limits of liability as are set out in this Convention without prejudi to the question as to who are the persons who have the right to bring s and what are their respective rights. In any such action, punitiv exemplary or any other non-compensatory damages shall not recoverable.

**Article 30 - Servants, Agents, - Aggregation of Claims**

1. If an action is brought against a servant or agent of the carri arising out of damage to which the Convention relates, such servant agent, if they prove that they acted within the scope of their employme shall be entitled to avail themselves of the conditions and limits of liabili which the carrier itself is entitled to invoke under this Convention.

2. The aggregate of the amounts recoverable from the carrier, servants and agents, in that case, shall not exceed the said limits.

3. Same in respect of the carriage of cargo, the provisions paragraphs 1 and 2 of this Article shall not apply if it is proved that t damage resulted from an act or omission of the servant or agent do with intent to cause damage or recklessly and with knowledge th damage would probably result.

**Article 31 - Timely Notice of Complaints**

1. Receipt by the person entitled to delivery of checked baggage cargo without complaint is *prima facie* evidence that the same has be delivered in good condition and in accordance with the document carriage or with the record preserved by the other means referred to

paragraph 2 of Article 3, and paragraph 2, of Article 4.

2. In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage. and at the latest, within seven days from the date of receipt in the case of checked baggage and fourteen days from the date of receipt in the case of cargo. In the case of delay the complaint must be made at the latest within twenty-one days from the date on which the baggage or cargo have been placed at his or her disposal.

3. Every complaint must be made in writing and given or despatched within the times aforesaid.

4. If no complaint is made within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on its part.

### Article 32 - Death of Person Liable

In the case of the death of the person liable, an action for damages lies in accordance with the terms of this Convention against those legally representing his or her estate.

### Article 33 - Jurisdiction

1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the State Parties, either before the Court of the domicile of the carrier or of its principle place of business, or where it has a place of business through which the contract has been made or before the Court at the place of destination.

2. In respect of damage resulting from the death or injury of a passenger, an action may be brought one of the Court mentioned in paragraph 1 of this Article, or in the territory of a State Party in which at the time of the accident the passenger has his or her principle and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft, or on another carrier's aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement

3. For the purposes of paragraph 2.

(*a*) "commercial agreement" means an agreement, other than an agency agreement, made between carriers and relating to the provision of their joint services for carriage of passengers by air.

(*b*) "principal and permanent residence" means the one fixed and permanent abode of the passenger at the time of the accident.

The nationality of the passenger shall not be the determining factor in this regard.

4. Questions of procedure shall be governed by the law of the Court seised of the case.

### Article 34 - Arbitration

1. Subject to the provisions of this Article, the parties to the contract of carriage for cargo may stipulate that any dispute relating to the liability of the carrier under this Convention shall be settled by arbitration. Such agreement shall be in writing.

2. The arbitration proceedings shall, at the option of the claimant, take place within one of the jurisdictions referred to in Article 33.

3. The arbitrator or arbitration tribunal shall apply the provisions of this Convention.

4. The provisions of paragraphs 2 and 3 of this Article shall be deemed to be part of every arbitration clause or agreement. and any term of such clause or agreement which is inconsistent therewith shall be null and void.

### Article 35 - Limitation of Actions

1. The right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from they date of arrival at the destination, or from the date on which the aircraft ought to have arrived or from the date on which the carriage stopped.

2. The method of calculating that period shall be determined by the law of the Court seised of the case.

### Article 36 - Successive Carriage

1. In the case of carriage to be performed by various successive carriers and falling within the definition set out in paragraph 3 of Article 1, each carrier who accepts passengers, baggage or cargo is subject to the rules set out in this Convention, and is deemed to be one of the parties to the contract of carriage is so far as the contract deals with that part of the carriage which is performed under its supervision.

2. In the case of carriage of this nature, the passenger or any person entitled to compensation in respect of him or, her, can take action only against the carrier who performed the carriage during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

3. As regards baggage or cargo, the passenger or consignor will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier who performed the carriage during which the destruction, loss, damage or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee.

### Article 37 - Right of Recourse against Third Parties

Nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person.

## CHAPTER IV

## Combined Carriage

### Article 38 - Combined Carriage

1. In the case of combined carriage performed partly by air partly by any other mode of carriage, the provision of this Convention shall, subject to paragraph 4 of Article 18, apply only to the carriage by air, provided that the carriage by air falls within the terms of Article 1.

2. Nothing in this Convention shall prevent the parties in the case of combined carriage from inserting in the document of air carriage conditions relating to other modes of carriage, provided that the provisions of this Convention are observed as regards the carriage by air.

## CHAPTER V

## Carriage by Air Performed by a Person Other than the Contraction Carrier

### Article 39 - Contracting Carrier - Actual Carrier

The provisions of this Chapter apply when a person (hereinafter referred to as "the contracting carrier") as a principal makes a contract of carriage governed by this Convention with a passenger or consignor or with a person acting on behalf or the passenger or consignor, and another person (hereinafter referred to as "the actual carrier") performs, by virtue of authority from the contracting carrier, the whole or part of the carriage, but is not with respect to such part a successive carrier within the meaning of this Convention. Such authority shall be presumed in the absence of proof to the contrary.

### Article 40 - Respective Liability of Contracting and Actual Carriers

If an actual carrier performs the whole or part of carriage which, according to the agreement referred to in Article 39, is governed by this Convention, both the contracting carrier and the actual carrier shall, except as otherwise provided in this Chapter, be subject to the rules of this Convention, the former for the whole of the carriage contemplated in the agreement, the latter solely for the carriage which it performs.

### Article 41 - Mutual Liability

1. The acts and omissions of the actual carrier and of its servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the contracting carrier.

2. The acts and omissions of the contracting carrier and of its servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the actual carrier. Nevertheless, no such act or omission shall subject the actual carrier to liability exceeding the amounts referred to in Articles 21, 22, 23 and 24. Any special agreement under which the contracting carrier assumes obligation not imposed by this Convention or any waiver of rights or defence conferred by this Convention or any special declaration of interest in delivery at destination contemplated in Article 22 shall not affect the actual carrier under agreed by it.

### Article 42 - Addressee of Complaints and Instructions

Any complaint to be made or instruction to be given under this Convention to the carrier shall have the same effect whether addressed to the contracting carrier or to the actual carrier. Nevertheless, instructions referred to in Article 12 shall only by effective if addressed to the contracting carrier.

### Article 43 - Servants and Agents

In relation to the carriage performed by the actual carrier, any servant or agent of that carrier of the contracting carrier shall, if they prove that they acted within the scope of their employment, be entitled to avail themselves of the conditions and limits of liability which are applicable under this Convention to the carrier whose servant or agent they are unless it is proved that they acted in a manner that prevents the limits of liability from being invoked in accordance with this Convention.

### Article 44 - Aggregation of Damages

In relation to the carriage performed by the actual carrier, the ggregate of the amounts recoverable from that carrier and the contracting arrier, and from their servants and agents acting within their scope of mployment, shall not exceed the highest amount which could be warded against either the contracting carrier or the actual carrier under his Convention, but none of the persons mentioned shall be liable for a um in excess of the limit applicable to that person.

### Article 45 - Addressee of Claims

In relation to the carriage performed by the actual carrier, an action for damages may be brought, at the option of the plaintiff, against that carrier or the contracting carrier, or against both together or separately. If the action is brought against only one of those carriers, that carrier shall have the right to require the other carrier to be joined in the proceedings, the procedure and effects being governed by the law of the Court seised of the case.

### Article 46 - Additional Jurisdictions

Any action for damages contemplated in Article 45 must be brought, at the option of the plaintiff, in the territory of one of the State Parties, either before a court in which an action may be brought against the contracting carrier, as provide in Article 33 of this Convention, or before the court having jurisdiction at the place where the actual carrier has its domicile or its principal place of business.

### Article 47 - Invalidity of Contractual Provisions

Any contractual provision tending to relieve the contracting carrier or the actual carrier of liability under this Chapter or to fix a lower limit than that which is applicable according to this Chapter shall be null and void, but the nullity of any such provision does not involve the nullity of the whole Contract, which shall remain subject to the provisions of this Chapter.

### Article 48 - Mutual Relations of Contracting and Actual Carriers

Except as provided in Article 45, nothing in this Chapter shall affect the rights and obligations of the carriers between themselves, including any right of recourse or indemnification.

## CHAPTER VI

### Other Provisions

### Article 49 - Mandatory Application

Any clause contained in the contract of carriage and all specia agreements entered into before the damage occurred by which the partie purport to infringe the rules laid down by this Convention, whether b deciding the law to be applied, or by altering the rules as to jurisdictior shall be null and void.

### Article 50 - Insurance

States Parties shall require their carriers to maintain adequat insurance covering their liability under this Convention. A carrier ma be required by the State into which it operate to furnish evidence that i maintains adequate insurance covering its liability under thi Convention.

### Article 51 - Carriage Performed in Extraordinary Circumstances

The provisions of Article 3 to 5, 7 and 8 relating to the documentatio of carriage shall not apply in the case of carriage performed i extraordinary circumstances outside the normal scope of a carrier' business.

### Article 52 - Definition of Days

The expression "days" when used in this Convention mean calendar days not working days.

## CHAPTER VII

### Final Clauses

### Article 53 - Signature, Ratification and Entry into Force

1. This Convention shall be open for signature in Montreal on 2 May 1999 by States participating in the International Conference on Ai Law held at Montreal from 10 to 28 May 1999. After 28 May 1999 th Convention shall be open to all States for signature at the Headquarter of the International Civil Aviation Organization in Montreal until it enter into force in accordance with paragraph 6 of this Article.

2. The Depositor shall promptly notify all signatories and Stats Partie of:

(*a*) each signature of this Convention and date thereof:

(*b*) each deposit of an instrument of ratification, approval or accession and date thereof;

(*c*) the date of entry into force of this Convention;

(*d*) the date of the coming into force of any revision of the limits of liability established under this Convention;

(*e*) any denunciation under Article 54;

**Article 54 - Denunciation**

1. Any State Party may denounce this Convention by written notification to the Depositary.

2. Denunciation shall take effect one hundred and eighty days following the date on which notification is received by the Depositary.

**Article 55 - Relationship with other Warsaw Convention Instruments**

1. This Convention shall prevail over any rules which apply to international carriage by air, between States Parties to this Convention by virtue of those states commonly being party to:

(*a*) the *Convention for the Unification of Certain Rules Relating to International Carriage by Air* signed at Warsaw on 12 October 1929 (hereinafter called the Warsaw Convention);

(*b*) the *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929* singed at The Hague on 28 September 1955 (hereinafter called the Hague Protocol);

(*c*) the *Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier* signed at Guadalajara on 18 September 1961 (hereinafter called the Guadalajara Convention);

(*d*) the *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955* signed at Guatemala City on 8 March 1971 (hereinafter called the Guatemala City on 8 March 1971 (hereinafter called the Guatemala City Protocol); or

(*e*) Additional Protocol Nos. 1 to 3 and Montreal Protocol No.4 to amend the Warsaw Convention as amended by The Hague Protocol or the Warsaw Convention as amended by both The Hague Protocol and the Guatemala City Protocol Signed at Montreal on 25 September 1975 (hereinafter called the Montreal Protocols); or

2. Within the territory of any single State Party to this Convention by virtue of that State being Party to one or more of the instruments referred to in sub-paragraphs (a) to (e) above.

Provided that nothing in this paragraph shall apply where, in the case of international carriage by air within the territory of a State Party to this Convention if there is an agreed stopping place in the territory of another State, that other State is not a Party to this Convention but in common with that State Party to this Convention is a Party to one or more of the instruments referred to in sub-paragraphs (a) to (e) above.

**Article 56 - Reservations**

No reservation may be made to this Convention except that a State may at any time declare by a notification addressed to the Depositary that this Convention shall not apply to :

(*a*) international carriage by air performed and operated directly by that State Party for non-commercial purposes in respect to its functions and duties as a sovereign State; and /or

(*b*) the carriage of person, cargo and baggage for its military authorities on aircraft registered in or leased by that State Party, the whole capacity of which has been reserved by or on behalf of such authorities.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, having been duly authorized, have signed this Convention.

DONE at Montreal on the 28 day of May of the Year one thousand hundred and ninetynine in the English, Arabic, Chinese, French, Russian and Spanish languages, all texts being equally authentic. This Convention shall remain deposited in the archives of the International Civil Aviation Organization and certified copies thereof shall be transmitted by the Depositary to all State Parties to the Warsaw Convention, the Hague Protocol, the Guadalajara Convention, the Guatemala City Protocol, the Montreal Additional Protocols and Montreal Protocol No.4.

# BOOK REVIEWS

**R.P. Dhokalia and B.C. Nirmal** ***(eds), International Court in Transition: Essays in Memory of Professor Dharma Pratap*** **(Chugh Publications, Allahabad, 1994), pp. xvi+351, Price Rs. 100/-.**

The subject of the International Court of Justice was the late Professor Dharma Pratap's first love. His first book on *Advisory Jurisdiction of the International Court of Justice* was well received.[1] Dharma Pratap, a former Dean of the prestigious Benaras Hindu University Law Faculty, was an erudite scholar in international law. The book under review is a "modest tribute by some of his former colleagues, friends and admirers", as its preface puts it.

The book comprises of twelve articles. The contributors include Peter Macalister-Smith, J.G. Merrills, W. Paul Gormely, R.P Dhokalia, Jerome B. Elkind, B.C. Nirmal, R.A. Malaviya, H.O. Agarwal, S.K. Kapoor, D.P. Verma and M.N.P. Srivastava.

Macalister-Smith's article on "Diverse Approach to International Adjudication with Particular Reference to the International Court of Justice" is a neat introduction to international adjudication, while Merills deals with the Role and Limits of International Adjudication, with a special focus on the *Nicaragua* case. Merrills' exposition of the nature of international disputes and their justifiability is interesting. The *Northern Cameroons* ruling, however, is not final. It was distinguished from and the Court refused to apply it to the *Certain Phosphate Lands in Nauru* case where Australia, the Respondent, argued that the U.K. and New Zealand were also essential parties in a position similar to that of Australia. On the other hand, the Court applied *Northern Cameroons* ruling in the *Timor* case, and decided that it lacked jurisdiction in the absence of Indonesia, one of the parties to the *Timor Gap Treaty*. In other words, the "limits" could move with the merits of each case, as the Court perceives them and the *Northern Cameroons* did not end in 1963. Equally, the statement that the majority of judges in the *Nuclear Tests* cases saw that " the underlying dispute has been settled" is not a correct view (p.50). What happened in the *Nuclear Tests* was that there was a French Government Statement discontinuing "the present series" of nuclears tests. The Court, not wishing to adjudicate on the 'sensitive' issue, decided to take the dubious escape route and held that the cases had no objective to be served in view of the French statement. By taking this route, the Court also avoided pronouncing upon the 'national

1. See the Book Review, *IJIL*, Vol. 13 (1973), pp. 323-25.

defence' reservation relied on by France which refused to submit to it jurisdiction. The discussion on the "concurrent pursuit of other mean of settlement" is also interesting, even if it does not take note of th 'political' use of the judicial forum made by parties to some cases, suc as the *Trial of Pakaistani Prisoners of War,* and now the *Aerial Inciden of 10 August 1999.*

J.G. Merrills in "The Role and Limits of International Adjudication draws three conclusions from his study of the ICJ's jurisprudence. First a dispute "will only be regarded as justiciable if a judgment will b capable of effective application". Secondly, pclitical, non-judicia methods have a crucial role to play in putting in place arrangements fo dispute settlement and dispute avoidance. Finally, the judicial and non judicial means of handling disputes need to be distinct, but should no be mutually exclusive. No dispute with the second and the thirc conclusions, but it is difficult to accept, the first. What constitutes effective application? Was the subject matter of *Nicaragua* ruling "non-justiciable", simply because the case dealt with a continuing use of force situation, or it related to larger political issues being dealt with by a separate diplomatic process regionally, or else the defendant (which happened to be a superpower) warned the Court even before the latter launched in the merits phase of the case? Should justiciabilaity issue depend upon the political (legally of course, the parties are bound to respect the Court decisions, once they accepted its jurisdiction) willingness to abide by the Court's decision? Remember the famous US Presidential statement. "If Marshall gave such judgment let him enforce it". Indeed, enforceability of judgments remains a separate issue even in the domestic arena and depends on the strength of the polity. The implementation of a judgment is the concern and responsibility of the executive part of the process of government, and has little to do with the justiciability issue.

W. Paul Gormley's delightful essay on the "Transition of the International Court of Justice since its inception into the Present Times A Far-reaching Approach", presents a bird's eye-view of the evolution of the Court, notes the tardiness with which states submit to the Court's jurisdiction, notes also the major trends hampering the use of the Court such as defiance of the Court's provisional measures, orders and non-appearance by defendant states, and highlights the point that the primary problem lies in the state attitudes. It also take into account the recently increased activity of the Court proceedings, limiting thereby the utility of the Court's procedure to deal with cases which require expeditious settlement. It argues in favour of expansion of appellate jurisdiction of the Court and enlargement of its jurisdiction by providing direct access

o individuals and non-governmental entities (a long time pet theme dvocated by Gormley).

R.P. Dhokalia, in his essay on "International Court in Transition: Challenges to its Effectiveness from South-West Africa Decision to Nicaragua Judgment", so absorbingly contrasts the 1966 and 1986 rulings of the Court. He rightly applauds the latter ruling for "the Court's bold and laudable resolution of fundamental legal issues of legal control of recourse to force" (p. 124). According to him, the contemporary challenges to international adjudication, encompasses the lack of faith of states in vigorous international adjudication, the problem if non-appearance of parties and marginal use of the Court. His is a good study of the implications of the Nicaragua ruling.

Jerome B. Elkind's, "Non-appearance Before The International Court" relates to the phenomenon of non-apperarance of a respondent party to its claim of non-justiciability of the dispute. He also highlights the extra-procedural advantages wrongfully derived by the non-appearing party. While he rightly criticizes the practice of non-appearance, he does not examine, in any depth, its impact on the adjudicative process, as against Article 53 of the ICJ Statute. B.C. Nirmal's piece on "Intervention before the ICJ" examines Articles 62 and 63 of the Statute in action. He contrasts the early jurisprudence of the Court with the recent *Gulf of Fonseca* case and welcomes the Court's more liberal approach as reflecting "a positive and welcome trend", (p.227). This essay is an important contribution to an area of the Court's jurisprudence that seldom invites in depth examination.

R.A. Malaivya, on the other hand, engages in a *tour de force* in tracing and evaluating contribution of the Court to the development of the Law of the Sea. Some of his conclusions are worthy of note. While appreciating the monumental contribution of the Court in this important area and its influence on the international laegislative process, he notes that, "Equity is the Golden thread that has run through the long line of decision of the ICJ" (p. 274).

H.O. Agarwal deals with a difficult area of the ICJ's Procedure —the jurisdiction. One would have certainly liked him to launch an examination of India's attitude to the Court's jurisdiction.

Enforcement of ICJ decisions is the theme of S.K. Kapoor's paper. This it examines against the backdrop of US defiance of the *Nicaragua* ruling. It analyses Article 92 (1) and Article 94(2) of the UN Charter. It might have been a good idea of what happened to each advisory opinion in the practice of the United Nations. For instance, the *Admissions* cases did nothing to solve the Cold War Politics of admissions. The *Certain*

*Expenses* ruling was rejected by Member States in respect o peacekeeping operations and the UN General Assembly had to appoir a Special Committee to look into the issue of financing the peacekeepin operations.

D.P. Verma focussed on a recent phenomenon—the Chambe procedure of the ICJ. He rightly says that the *ad hoc* Chamber process i "a halfway house between adjudication and arbitration" (p. 331). Beside Judge Schwebel there were other Judges as well e.g. Judge Oda an Judge Shahabuddeen--who have had reservations to this "Populist procedure. One is rather uncomfortable with the issues of compatibilit of the Rules of Court with the Statute. Also, the parties tend to choos judges of their liking, not necessarily on the basis of their expertise Exclusion of Judge Oda from the *Gulf of Maine* Chamber is rather telling Also, how many Third World Judges have had an opportunity to sit o such Chambers constituted to deal with disputes of non-Third Worl Parties?

The final essay is on the "Reform of the Court" by M.N.P. Srivastava While many of the proposals made are revolutionary, one suspects tha the world of today is not likely to go beyond Article 33 of the UN Charte for a long time to come.

The editors of this volume on the ICJ deserve hearty congratulation for conceiving and producing such an analytical work on the Court. The reviewer is glad to note that, one of the editors and contributors, Professo Dhokalia, is a former Secretary-General of this ISIL (1986-1992).

V.S. MANI*

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* Of the Editorial Board.

**N. Gopalsamy, *GATT/WTO TRIPs, TRIMs and Trade in Services* (Wheeler Publishing, New Delhi. 1998), pp. 425 and xiv, Price Rs. 235.**

The final outcome of the Uruguay Round multilateral trade negotiations which brought into existence the World Trade Organisation (WTO) has raised several implementation issues. For developing countries, particularly for India, these issues have brought into focus various economic and legal problems. It should be noted that one of the primary objectives of the WTO Agreements is to progressively liberalize the global economy. For this purpose, the obligations as enunciated in the WTO Agreements require Member States to bring their domestic legal and policy framework in tune with the rules of the multilateral trading system. In other words, it could be stated that the WTO Agreements reflect and codify the rules of the multilateral trading system and therefore, countries who have accepted these obligations must implement them.

The post-Uruguay Round scenario is positing several difficult choices for the developing countries. So far there is no comprehensive attempt made to out line and analyse these difficult choices before the developing countries, including India. It is true that the implementation issues are being addressed by the Governments in a limited way taking into account varied parameters such as economic development, self-reliance, indigeneous technological base, environmental considerations and other sociological-cultural dimensions. It is therefore, clear that to analyse the process of implementation we need to develop an inter-disciplinary approach. A mere reference to set of facts and their economic and legal analysis would not suffice if we are keen to understand the implications arising out of the issues relating to implementation of the various WTO Agreements.

The book under review seeks to examine all the multilaterally laid down rules and regulations of the General Agreement on Tariffs and Trade (GATT) and its implications to India. Its approach is to provide useful information on all major developments having a bearing on the subject. As noted by the author, the book seeks to answer some pertinent questions like "what new legislation and policy measures India needs to undertake and why, what are the implication of various articles as provided in the texts of different GATT Agreements (included in the Final Act), what opportunities are provided by WTO for expansion of trade and for sharpening of competition by the developing countries and how best the developing countries can cope with the challenges posed by the new world trading order". These questions are not only pertinent, but need extensive analysis before reaching any viable

conclusion or suggesting any alternative. The book, while attempting find answer to all these questions, traverses many areas and fails to focu on any pertinent question.

The positive aspect of this book is that it provides and compiles a huge amount of information relating to the subject with particula reference to India. The value of the book would have been enhance had it referred to the sources of these information in the appropriat footnotes or at least in a bibliography. The small print, without prope spacing, makes reading a tiresome exercise, particularly whe information of this kind is being compiled.

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